95-1449

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

CLARENCE DUDLEY AND GEORGIANNA DUDLEY,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, Second District of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the $8.25 million punitive damage award imposed in this case is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. *See BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting certiorari to consider excessiveness of punitive damage awards under Due Process Clause).

2. Whether the punitive damage award constitutes an excessive monetary punishment subject to constitutional review under the Excessive Fines Clause of the Eighth Amendment because the State of Florida has a statutory entitlement to 35% of all punitive damage awards in civil actions in which Florida substantive law applies.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglass Industries, Ltd.

Arabian Fiberglas Insulation Company

Asahi Fiber Glass Company, Ltd.

Fiberglas Colombia, S.A.

Polyplaster, S.A.

Scandinavian Glasfiber AB

Vitro-Fibras, S.A.

The parties to the appeal in the District Court of Appeal, Second District of Florida, in addition to those listed in the caption to this petition, included:

Public Medical Assistance Trust Fund of the State of Florida

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-615

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

CLARENCE DUDLEY AND
GEORGIANNA DUDLEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

Petitioner Owens-Corning Fiberglas Corporation ("OCF") respectfully petitions this Court for a writ of certiorari to review the judgment of the District Court of Appeal, Second District of Florida, entered in this case on December 8, 1995.

OPINIONS BELOW

The opinion of the District Court of Appeal [App. 1a] is unreported. The amended final judgment of the trial court, the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, State of Florida, Civil Division, is reprinted at App. 2a-3a.

JURISDICTION

The judgment of the District Court of Appeal was entered on December 8, 1995. On January 17, 1996, the District Court of Appeal denied OCF's motions seeking, *inter alia*, rehearing *en banc* and certification to the Florida Supreme Court [App. 4a]. This petition has been filed within 90 days of the District Court of Appeal's entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution Provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

Florida Statute § 768.73, the statutory provision governing the award and allocation of punitive damages in civil cases tried pursuant to Florida substantive law, is reproduced in its entirety at App. 120a-122a.

STATEMENT OF THE CASE

I. Factual Background

Beginning in 1943, Owens-Illinois, Inc. ("O-I") manufactured and sold an asbestos-containing insulation product called Kaylo. In 1953, OCF began selling Kaylo pursuant to a distribution agreement with O-I. In 1958, O-I sold its Kaylo manufacturing operations to OCF, and thereafter OCF manufactured and sold Kaylo. OCF began to manufacture asbestos-free Kaylo in 1972. [App. 42a-43a].[1]

More than 20 years later, OCF has received hundreds of thousands of claims from persons alleging injury from exposure to Kaylo. As of 1993, OCF had already resolved approximately 120,000 asbestos personal-injury claims and had taken a cumulative charge of $943 million against earnings to account for the estimated uninsured costs of asbestos claims through 1999. As of 1994, well over $70 million in punitive damages has been awarded against OCF in asbestos cases. [App. 75a-76a & n.13; 85a-88a & n.19].

Respondent Clarence Dudley worked as a sheet metal worker at a shipyard in Tampa, Florida during the early 1970s. [App. 39a]. While Mr. Dudley did not work directly with asbestos, asbestos-containing products were used during the 1970s in the engine and boiler rooms of tankers and cargo ships serviced at the shipyard. *Id.* Mr. Dudley was later diagnosed with mesothelioma, a cancer of

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1 Because neither the trial court nor the District Court of Appeal for the Second District of Florida issued a written opinion in this case, OCF has supported the statement of facts recited above with citations to the opening brief [App. 21a-98a] and reply brief [App. 99a-119a] OCF filed in with the District Court of Appeal in this matter.

the pleura (lung lining) believed to be caused by asbestos. [App. 41a].

II. Proceedings in the Trial Court

Mr. Dudley and his wife, respondent Georgianna Dudley, sued eleven former manufacturers of asbestos products for personal injuries allegedly arising out of a brief exposure to asbestos-containing products in or around 1972. [App. 37a]. The case went to trial against OCF as the sole defendant.

The trial court denied OCF's pre-trial motion to strike punitive damages on federal constitutional grounds and denied as well OCF's motion for directed verdict on the issue of punitive damages made at the close of evidence. [App. 36a-39a]. Even though OCF introduced evidence showing that OCF's Kaylo product complied with government and industry safety standards existing during the 1970s [App. 40a n.3; 93a-96a], the jury imposed $15 million in punitive damages against OCF in addition to $2.75 million in compensatory damages for Mr. Dudley's injuries and $1.51 million in compensatory damages for Georgianna Dudley's losses. [App. 39a].

OCF filed a post-trial motion seeking judgment notwithstanding the verdict, a new trial, or remittitur of the damages awarded by the jury. [App. 5a-11a]. OCF argued that the trial court "erred in failing to grant [OCF's] Motion to Strike Punitive Damages and Motion in Limine as to Punitive Damages, where it was apparent that no legal basis existed for the imposition of punitive damages and the imposition of any punitive damages would violate the United States Constitution." [App. 7a]. OCF also argued that the punitive damage award was "excessive under the Constitution of the United States" and that its "imposition [would] violate[] the Eighth Amendment and the Due

Process Clause of the Fourteenth Amendment." [App. 8a]. OCF further maintained that the punitive damage award was constitutionally excessive because "the record [did] not establish an intent to injure sufficient to sustain the verdict" and because "[a]ny award of punitive damages against [OCF] at this stage of the asbestos litigation [was] unnecessary." [App. 9a]. Finally, OCF argued that the trial court should reduce the punitive damage award because the punitive damages awarded were presumptively excessive under Florida Statute § 768.73(1)(a) because they exceeded three times the amount of compensatory damages awarded. [App. 8a].

The trial court remitted the punitive damage award to three times the compensatory damages of Clarence Dudley or $8.25 million dollars and rejected without explanation OCF's federal constitutional challenges to the punitive damage award. [App. 2a-3a].

III. Proceedings on Appeal

On appeal to the District Court of Appeal for the Second District of Florida, OCF contended, inter alia, that the award of punitive damages was unconstitutionally excessive in violation of the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. [App. 83a-96a, App. 111a-117a]. OCF argued that the award was unconstitutionally excessive in view of the multiple and widely varying punitive awards already imposed (and likely to be imposed) on OCF in other cases. [App. 84a-91a]. OCF also argued that the award violated its federal due process rights because, *inter alia*, the evidence showed that OCF's product satisfied applicable industry and government safety standards. [App. 40a n.3; 93a-96a]. Indeed, the trial evidence indicated that the dust raised by the ordinary cutting and

handling of Kaylo did not exceed threshold standards which had been "recommended by the American Conference of Governmental Industrial Hygienists and adopted by most jurisdictions, including Florida, New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located)." [App. 94a-95a]. Moreover, as OCF noted in its brief on appeal, the evidence at trial that OCF complied with OSHA warning-label requirements even before those requirements went into effect was uncontroverted. [App. 40a n.3; 94a-95a].

In addition, OCF argued that the punitive damage award constituted a monetary punishment subject to constitutional limitation under the Excessive Fines Clause of the Eighth Amendment because the State of Florida has a statutory entitlement to 35% of punitive damages awarded in civil actions tried pursuant to Florida substantive law. [App. 59a-80a]. OCF argued that the punitive damage award violated the Excessive Fines Clause because the award was disproportionate to any wrong committed by OCF. [App. 73a-78a]. Further, OCF argued to the District Court of Appeal that the Excessive Fines Clause at a minimum prohibits repetitive monetary punishments for a single course of conduct that threaten to eventually deprive a corporate defendant such as OCF of the ability to conduct its business. [App. 79a-82a].

The District Court of Appeal for the Second District of Florida affirmed the judgment of the trial court in a one-word per curiam opinion. [App. 1a].

OCF timely filed three motions following the District Court of Appeal's summary affirmance of the judgment against OCF: (1) a motion for rehearing en banc [App. 12a-14a]; (2) a motion seeking clarification of the basis of the court's decision and certification to the Florida Supreme Court arguing, inter alia, that the punitive damage award was excessive in violation of the Due Process Clause of the

Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment [App. 15a-18a]; and (3) a motion to stay the issuance of mandate during the pendency of all review proceedings in Florida courts or, in the alternative, a request to stay the issuance of mandate for a period of 60 days to allow OCF to seek a stay of execution from this Court conditioned on the filing of a Petition for Writ of Certiorari [App. 19a-20a]. The Florida Court of Appeal denied all of OCF's motions by order dated January 17, 1996. [App. 4a].

On January 24, 1996, OCF filed an application to stay execution of the judgment with Justice Kennedy, who granted a temporary stay on January 24, 1996, pending receipt of a response to OCF's stay application. Following receipt of a response, Justice Kennedy granted a stay of the judgment on February 15, 1996. *See Owens-Corning Fiberglas Corp. v. Dudley*, No. A-615.

THE JUDGMENT BELOW FINALLY RESOLVES THE FEDERAL QUESTION PRESENTED IN THIS PETITION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a).

This petition presents the question whether the $8.25 million punitive damage award imposed on OCF is grossly excessive in violation of the Excessive Fines Clause and the Due Process Clause. As described above, those federal constitutional questions were presented to, and implicitly decided by, the District Court of Appeal. [App. 1a]. OCF also sought certification of its federal constitutional claims

to the Florida Supreme Court, but the District Court of Appeal denied OCF's motion. [App. 4a]. Because certification by the District Court of Appeal would have provided the only basis for the Florida Supreme Court's assumption of jurisdiction over this case, it is clear that OCF is seeking review of a decision "rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a). As all disputed issues were resolved by the District Court of Appeal, the judgment below is unquestionably final for purposes of this Court's certiorari jurisdiction. *See generally* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 3.3 (7th ed. 1993).

REASONS FOR GRANTING THE WRIT

I. The $8.25 Million Award Of Punitive Damages Is Grossly Excessive In Violation Of The Due Process Clause And The Factors Presented In The *BMW* Case

As this Court has recognized, "the Constitution imposes a substantive limit on the size of punitive damage awards." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994). In *BMW of North America, Inc. v. Gore*, No. 94-896 (argued Oct. 11, 1995), this Court granted certiorari to decide, *inter alia*, what standards are to be applied in determining whether a punitive damage award is unconstitutionally excessive. *See* Pet. for Cert. in No. 94-896 ("*BMW* Pet.") at I (raising question whether the challenged punitive award "is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment"). BMW's petition for a writ of certiorari pointed to various factors

that demonstrate the excessiveness of the award in that case, *see BMW* Pet. 18-25, many of which are present in this case as well

A. The Issues Presented In This Case Are Strikingly Similar To Those Presented In *BMW*

In this case, OCF has consistently argued that the punitive damage award violates the substantive component of the Due Process Clause. *See supra* pp.-8. Moreover, many of the precise factors that demonstrate the excessiveness of the award in *BMW* are also present here, making this case a particularly strong candidate for review. For example, BMW argues in its brief on the merits that its compliance with statutory disclosure standards adopted in numerous States eliminates any justification for a large award of punitive damages. *BMW* Pet. Br. 37-40 & n.23. Similarly, BMW argues that "adherence to industry custom . . . constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one of enormous size." *BMW* Pet. Br. 40-41; *see BMW* Pet. 18-19.

In this case, OCF likewise argues that the award violates its federal due process rights because the evidence showed that OCF's product complied with the standards "recommended by the American Conference of Governmental Industrial Hygienists and adopted by most jurisdictions, including Florida, New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located)." [App. 94a-95a]. Moreover, OCF complied with OSHA warning-label requirements even before those requirements went into effect. [App. 40a n.3; 94a-95a]. Thus, essentially the same factors relied upon by BMW are at issue in this case as well.

In addition, BMW argues at length that the punitive award is unconstitutionally excessive in part because the *BMW* case involves a "mass tort" and therefore creates the potential for multiple punitive awards arising out of the same course of conduct. *BMW* Pet. Br. 45-50. As BMW asserts, "[t]he question to be asked is: if every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?" *Id.* at 46; *see also BMW* Pet. 21.

Once again, precisely the same factor is present in this case. OCF has consistently argued that the excessiveness of the punitive damages award imposed in this case is demonstrated by the existence of, and potential for, numerous other claims of injury and punitive awards arising out of the same course of conduct, *i.e.*, OCF's manufacture and distribution of asbestos-containing Kaylo. [App. 79a-94a; App. 111a-116a]. Just as in *BMW*, moreover, the $8.5 punitive damage award at issue in this case would plainly be excessive "if every other plaintiff recovered the same amount of punitive damages." *BMW* Pet. Br. 46.

In short, this case raises the same question as that presented in *BMW*, and it does so in a very similar legal and factual setting that is even more compelling than *BMW*. Given the obvious and substantial similarities between the two cases, it is readily apparent that a favorable decision in *BMW* would have a direct and substantial impact on the outcome of this case. Indeed, OCF's application for a stay of execution was predicated in part on the substantial similarities between this case and *BMW*, and the Court (Kennedy, J.) found a sufficient probability of success to justify issuance of a stay. That determination amply supports OCF's contention that, at the very least, the question presented in this petition is likely to be affected by the resolution of the *BMW* case. Accordingly, at a minimum this petition should be held pending the Court's

decision in *BMW* and then disposed of in light of the disposition of that case.

B. The Lower State And Federal Courts Are Divided Over The Standards To Be Applied In Reviewing Punitive Damage Awards

The *BMW* petition argues persuasively that, despite this Court's prior decisions in this area,[2] punitive damage awards continue to skyrocket and the lower state and federal courts continue to apply inconsistent standards and reach conflicting results in reviewing the size of punitive damage verdicts. *BMW* Pet. 26-29. Thus, the *BMW* petition demonstrates that the lower federal and state courts are in substantial need of additional guidance on the proper approach to the excessiveness inquiry. This Court's decision to grant review in *BMW* establishes the importance and significance of that question. Review of that same question would therefore be warranted in this case if the Court's disposition of *BMW* were to leave that question unresolved.

Indeed, this case is a particularly strong candidate for review in that regard, because the decision below is directly inconsistent with the decision of the Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied*, 114 S. Ct. 650 (1993), which involved an asbestos personal injury suit against OCF arising out of the same course of conduct at issue here. In *Dunn*, the Court of Appeals held that the district court gave "insufficient consideration to the effect of successive punitive awards in asbestos litigation" when it remitted a $25 million award against OCF to $2 million. 1 F.3d at 1391. Accordingly, the en banc court

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2 *See, e.g., Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

further reduced the award against OCF to $1 million, explaining that an award of that size was "the *maximum* amount of punitive damages that could reasonably have been awarded in this case." *Id.* (emphasis added).[3]

Similarly, numerous other courts have emphasized that the existence of, or potential for, other punitive damage awards against the same defendant for the same course of conduct raises due process concerns and is an appropriate factor to be considered in determining whether a particular award is grossly excessive.[4] Although OCF argued this point at length to the District Court of Appeal [App. 79a-94a; 111a-116a], that court (unlike the Third Circuit in

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[3] Five members of the court dissented on the ground that the Due Process Clauses bars *any* further awards of punitive damages against OCF because the amounts already awarded in prior litigation are more than necessary to achieve fully the goals of punishment and deterrence. *Id.* at 1400-05 (Weis, J., dissenting, joined by Greenberg, Hutchinson & Scirica, JJ.); *id.* at 1405 (Becker, J., dissenting).

[4] *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (citing with approval the Alabama Supreme Court's consideration of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation"); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (en banc) (*Haslip* requires consideration of "other civil or criminal penalties levied on the defendant"); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991); *see also In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852, *and cert. denied*, 479 U.S. 915 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-41 (2d Cir. 1967) (Friendly, J.); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234, 1236 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Dunn v. HOVIC) was unpersuaded. Plenary review of this issue is therefore warranted if this Court's disposition of *BMW* does not itself require reconsideration of the judgment in this case.

II. This Court Should Resolve The Important Question Whether The Excessive Fines Clause Imposes Limitations On Punitive Damage Awards Where The State Has A Right To Recover A Share Of The Damages Awarded

This case raises a specific question reserved by the Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989): whether the Excessive Fines Clause constrains the imposition of punitive damage awards in civil cases where the State shares in any such damages exacted. The Court's reservation of this question in *Browning-Ferris* establishes the importance and significance of the Excessive Fines Clause question presented in this petition.

In *Browning-Ferris*, the Court suggested that the Excessive Fines Clause places constitutional limitations on monetary punishments imposed in the form of civil punitive damages if the government is entitled to a share of the award. The Court determined that the Excessive Fines Clause does not "constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Browning-Ferris*, at 264. Recognizing that the State's interest and involvement in a punitive damage award presents a distinct constitutional question, the Court specifically reserved judgment on the issue whether the Excessive Fines Clause limits monetary punishments in the form of punitive damages either "directly imposed by" or "payable to" the government. *Id.* at 268.

This case squarely presents the issue reserved by the Court in *Browning-Ferris* because under Florida Statute § 768.73(2)(b), the State of Florida is entitled to 35% of any punitive damages awarded in a civil action in which Florida substantive law governs. Indeed, the structure of § 768.73 reflects the Florida legislature's judgment that the State's interest in a punitive damage award stands on equal footing with that of the injured plaintiff. First, the statute allocates the proceeds of a punitive damage award roughly equally between the State and the injured party, with the State receiving 35% of the award and the injured party receiving approximately 44% of the award (65% of the award less a reduction for standard attorneys' fees). Fla. Stat. Ann. §§ 768.73(2)(b) and (7) (West 1995). Second, if any part of a punitive damage award proves uncollectible, Fla. Stat. Ann. § 768.73(6) (West 1995) entitles the State and the injured party to a proportional share of the punitive damages actually collected. The Florida statutory scheme gives the State of Florida precisely the kind of interest and involvement in a punitive damage award that the *Browning-Ferris* Court suggested would trigger the application of the Excessive Fines Clause.

Moreover, this case is a particularly strong candidate for review because the Court recently rejected the proposition that the Excessive Fines Clause applies only to criminal proceedings. *Austin v. United States*, 113 S. Ct. 2801 (1993). *Austin* raised the issue whether the Government's ability to exact criminal punishment using the mechanism of *in rem* civil forfeiture proceedings implicated the Excessive Fines Clause of the Eighth Amendment. The Court ruled that the Excessive Fines Clause does contemplate limits on such monetary punishments and reasoned that the applicability of the Eighth Amendment does not turn on whether a particular proceeding is civil or criminal, but on whether the sanction imposed can be classified as "punishment." 113 S. Ct. at 2805-06.

Observing that the common "'notion of punishment. . . cuts across the division between the civil and the criminal law,'" the Court concluded that the "'Excessive Fines Clause limits the Government's power to extract payments'" whenever imposed as "'punishment for some offense.'" *Id.* at 2805 (quoting *United States v. Halper*, 490 U.S. 435, 447-448 (1989), and *Browning-Ferris*, 492 U.S. at 266-67). *Austin* stands for the proposition that any monetary punishment imposed by or payable to the government is subject to the limitations of the Excessive Fines Clause.

The Court's interpretation and application of the Excessive Fines Clause in *Austin* follows the course charted by the Court four years earlier in *Browning-Ferris* where, as explained above, the Court suggested that the Excessive Fines Clause places constitutional limitations on monetary punishments imposed in the form of civil punitive damages if the government is entitled to a share of the award.

The evolution of the Court's jurisprudence concerning the applicability of the Excessive Fines Clause to civil actions suggests that punitive damages assessed pursuant to § 768.73 are monetary punishments subject to constitutional limitation by the Excessive Fines Clause of the Eighth Amendment.[5]

The punitive damages awarded below are monetary punishments for at least two reasons previously articulated by this Court. First, as their name suggests and as historically understood, punitive damages serve the same

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5 The significance of this issue extends beyond civil cases in which punitive damages are assessed pursuant to Florida Statute § 768.73. Numerous states have adopted similar statutory provisions and now have, like Florida, a substantial stake in punitive damage awards rendered in private civil actions.

goals as criminal punishments. This Court has recognized that "punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Given the purpose of punitive damages, it is entirely appropriate to classify them as monetary punishments triggering a need for review under the Excessive Fines Clause.

Second, in the wake of this Court's decisions in *Browning-Ferris* and *Austin*, it is evident that the sphere of monetary punishments encompasses more than the notion of punitive fines or even forfeitures, but includes as well mandatory monetary payments payable to a sovereign that "can only be explained as serving in part to punish." *Austin*, 113 S. Ct. at 2805-06.

This case warrants review because the Excessive Fines Clause question presented in this case is an important and unsettled federal constitutional question that this Court has identified as constitutionally distinct from prior decisions of the Court involving the applicability of the Excessive Fines Clause to punitive damages awarded in civil actions. Moreover, the $8.25 million dollar award constitutes a monetary punishment that is excessive under any objective standard of that constitutional provision. In its consideration of the application of the Excessive Fines Clause in three cases over the past seven years, the Court has declined to establish any particular test for excessiveness, apparently deeming it prudent to "allow the lower courts to consider that question in the first instance." *Austin*, 113 S. Ct. at 2812 (citing *Yee v. City of Escondido*, 112 S. Ct. 1522, 1534 (1992)); *see also Alexander v. United States*, 113 S. Ct. 2766, 2776 (1993). Plenary review is required so that the Court can confirm that the

Excessive Fines Clause constrains the imposition of punitive damage awards in civil cases where the State shares in any such damages exacted. The Court should then remand this case to the state court to allow that court to consider in the first instance what particular test of excessiveness is constitutionally required.

CONCLUSION

The petition for a writ of certiorari should be either granted in full or held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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March 7, 1996

WL960580.050/16+

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

OWENS-CORNING FIBERGLAS CORPORATION

Appellant,

v.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Appellees.

Case No. 94-02059

Opinion filed December 8, 1995

Appeal from the Circuit Court for Hillsborough County; Thomas A. Miller, Sr., Judge

Crosby, Saad, Beebe & Crump Mobile, Alabama, and Steven R. Berger of Berger & Chafetz, Miami, for Appellant.

John F. Venable of Venable and Venable, P.A., Tampa, for Appellees.

PER CURIAM

Affirmed.

FRANK, A.C.J., and PATTERSON and WHATLEY, JJ. Concur.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY STATE OF FLORIDA CIVIL DIVISION

CLARENCE DUDLEY and GEORGIANNA DUDLEY, his wife

Plaintiffs, CASE NO: 93-9601

vs. ASBESTOS LITIGATION

OWENS-CORNING FIBERGLAS CORPORATION,

Defendants.

_____/

AMENDED FINAL JUDGMENT

Pursuant to the verdict rendered in this action

IT IS ADJUDGED as follows:

1. Plaintiff Clarence Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $2,614,670.00 (Two million six hundred fourteen thousand six hundred seventy and 00/100 Dollars) as compensatory damages, that shall bear interest at the rate of 12% a year for which let execution issue.

2. Plaintiff Georgianna Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $1,437,130.00 (One million four hundred thirty-seven thousand one hundred thirty and 00/100 Dollars) as compensatory damages, that shall bear interest at the rate of 12% a year for which let execution issue.

3. Plaintiff Clarence Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $5,362,500.00 (Five million three hundred sixty-two thousand five hundred and 00/100 Dollars) as punitive damages, that shall bear interest at the rate of 12% a year for which let execution issue.

4. The Public Medical Assistant Trust Fund of the State of Florida shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $2,887,500.00 (Two million eight hundred eighty-seven thousand five hundred and 00/100 Dollars) as punitive damages, that shall bear interest at the rate of 12% a year for which let execution issue.

5. Plaintiffs Clarence Dudley and Georgianna Dudley shall recover from Defendant Owens-Corning Fiberglas Corporation the sum of $3,319.85 (Three thousand three hundred nineteen and 85/100 Dollars) as costs, that shall bear interest at the rate of 12% a year for which let execution issue.

DONE AND ORDERED in Chambers, at Tampa, Hillsborough County, Florida this 25th day of May, 1994.

s/
JUDGE THOMAS MILLER

Copies furnished to:

John F. Venable, Esquire
Katherine Hill, Esquire
James Keifer, Esquire
State of Florida, Dept. of Legal Affairs, Civil Division

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA
January 17, 1996

OWENS-CORNING FIBERGLAS CORPORATION, Appellant(s), vs. CLARENCE DUDLEY and GEORGIANNA DUDLEY, Appellee(s).	Case No. 94-02059

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for clarification and/or certification and motion to stay mandate in this case, upon consideration, it is

ORDERED that the motions are hereby denied. It is further

ORDERED that appellant's motion for rehearing en banc is denied as not accompanied by a motion for rehearing.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER {SEAL}

WILLIAM A. HADDAD, CLERK

c: Steven R. Berger, Esq.
Richard M. Crump, Esq.
John F. Venable, Esq.

IN THE CIRCUIT COURT
THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CLARENCE DUDLEY and GEORGIANNA DUDLEY,	*	
Plaintiffs,	*	CIV. ACTION NO: 93-9601
vs.	*	
OWENS-CORNING FIBERGLAS CORPORATION,	*	
Defendants.	*	

_____/

MOTION OF DEFENDANT OWENS-CORNING FIBERGLAS CORPORATION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR OF THE AWARD OF DAMAGES

Comes now the Defendant, Owens-Corning Fiberglas Corporation, pursuant to Rule 1.530 of the Florida Rules of Civil Procedure, and moves the Court to set aside the verdict and the judgment entered in this cause and to enter judgment notwithstanding the verdict in favor of Owens-Corning Fiberglas Corporation. Alternatively, the Defendant moves for a new trial. As a further alternative, Defendant moves for a remittitur of the award of damages by reduction of the amount of compensatory damages and/or for the elimination or reduction of punitive damages or for such other relief as

Defendant may be entitled to receive. As separate and several grounds for said separate and alternative motions, the Defendant would show the Court as follows:

1. The judgment in favor of the Plaintiff, Clarence Dudley, and against the Defendant, Owens-Corning Fiberglas Corporation, is against the manifest weight of the evidence.

2. The judgment in favor of the Plaintiff, Clarence Dudley and against the Defendant, Owens-Corning Fiberglas Corporation, is against the manifest weight of the evidence in that this case was tried on the theory of negligent failure to warn and the evidence affirmatively established that Owens-Corning Fiberglas Corporation did in fact place a warning statement on the cartons of its asbestos-containing Kaylo beginning in approximately December of 1966. The warning was revised in 1970. This warning statement continued through approximately November of 1972 when the asbestos was removed from the product. The evidence affirmatively shows that there was no requirement for a warning by the United States Government or OSHA until 1971 (approximately five (5) years after Owens-Corning Fiberglas Corporation's warning). The evidence further affirmatively shows that the content of the warning was adequate and sufficient when compared to the OSHA warning which was in evidence. There was no evidence presented to the jury upon which a determination could be made that the warning was untimely and/or inadequate, and in fact, the evidence established that the warning was both timely and adequate.

3. The judgment in favor of the plaintiff, Clarence Dudley, and against the Defendant, Owens-Corning Fiberglas Corporation, is against the manifest weight of the evidence in that this case was tried on the theory of strict liability and design defect and the evidence affirmatively established that Owens-Corning Fiberglas Corporation did not design the Kaylo product and that

the Kaylo product was not defective. There was no evidence presented to the jury upon which a determination could be made that Owens-Corning Fiberglas Corporation designed the Kaylo product or that the Kaylo product was defective.

4. The Court erred in failing to grant Owens-Corning's Motion to Strike Punitive Damages and Motion in Limine as to Punitive Damages, where it was apparent that no legal basis existed for the imposition of punitive damages and the imposition of any punitive damages would violate the United States Constitution. The content of those motions is incorporated herein.

5. Plaintiff's counsel failed to introduce any evidence from which the jury could conclude by a preponderance of the evidence that Clarence Dudley was exposed to asbestos-containing insulation products manufactured by this Defendant in such an amount as to be injurious to his health.

6. It is affirmatively appeared from the evidence that, to the extent that Clarence Dudley's health has been damaged by exposure to asbestos, which Defendant denies, such damage was caused by exposure to asbestos-containing insulation products manufactured, sold and distributed by other Defendants and parties not Defendants to this action and/or by the negligence of others including, but not limited to, plaintiff's employer and was not caused by this Defendant. As such Defendant maintains that the trial court erred in failing to give a Fabre instruction and further erred in failing to include co-defendants, other manufacturers not defendants to this action, and other parties, including but not limited to, the plaintiff's employers, on the verdict form so that the jury could properly and accurately apportion liability in this case.

7. The verdict and jury award of damages in favor of the Plaintiff, Clarence Dudley and against the Defendant Owens-Corning Fiberglas Corporation, is

against the manifest weight of the evidence, is based upon speculative evidence, and is unjust.

8. The verdict and jury award of damages is excessive and the result of passion, prejudice, bias, sympathy, mistake, speculation or other improper motive or cause, and/or the passions of the jury were influenced by considerations outside the record.

9. The verdict and jury award of damages is excessive and the result of improper and prejudicial statements made by Plaintiffs' counsel to the jury during presentation of evidence and/or closing argument.

10. The award of compensatory damages is against the weight of evidence and is excessive under the Due Process Clause of the Fourteenth Amendment.

11. The punitive damages award is presumptively excessive under Florida law. The Legislature has made clear that "the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times that amount of compensatory damages. . .." § 768.73(1)(a), Fla. Stat. (1993) (emphasis added). Where punitive damages exceed this, "the award is presumed to be excessive and the defendant shall be entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive. . .." § 768.73(1)(b), Fla. Stat. (1993) (emphasis added).

12. The excessiveness of the punitive damages award indicates the jury's failure to render a proper verdict. The verdict does not bear a reasonable relationship to the amount of damages proved and the injury suffered. The verdict is against the manifest weight of the evidence and appears to have been rendered under the influence of mistake, prejudice, passion, sympathy, speculation, or other improper motive or consideration on the part of the jury.

13. The punitive damage award is excessive under the Constitution of the United States, and its imposition violates the Eighth Amendment and Due Process Clause of the Fourteenth Amendment.

14. The punitive damage award deprives Owens-Corning of its constitutional right of access to the courts under the First Amendment and the Due Process Clause of the Fourteenth Amendment.

15. The imposition of a punitive damage award violates the Due Process Clause of the Fourteenth Amendment because the record does not establish an intent to injure sufficient to sustain the verdict.

16. Any award of punitive damages against Owens-Corning at this stage of the asbestos litigation is unnecessary and violative of the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.

17. The Court committed reversible error in failing to sustain Defendant's objections based on materiality, relevance, and form and the Court allowed impermissible evidence to reach the jury.

18. The jury was improperly instructed on the law. The Court erred in denying Defendants' requested jury instructions as set out and argued by defendant during the charge conference and erred in giving certain of the plaintiff's requested jury instructions which were objected to by Defendant specifically during the charge conference. Defendant adopts by reference all arguments made at the charge conference.

19. The Court committed reversible error in refusing to grant defendant a continuance of one day to allow a witness to be present and in refusing to allow the defendant to read the trial testimony of Mr. Jerry Helser given in trials in which this defendant and plaintiff's counsel were involved before this Court within the last several months.

20. The Court committed reversible error in overruling certain objections made by the defendant to the use of the John Thomas deposition and also erred in overruling objections to certain designated portions therein.

21. The verdict is palpably wrong and manifestly unjust.

22. The verdict fails to do substantial justice.

23. The verdict is contrary to the law.

24. The verdict is contrary to the evidence presented.

25. The verdict is insufficient to support the verdict.

26. The verdict was such that there was no issue of fact as to which reasonable men could differ.

WHEREFORE, premises considered, the Defendant, Owens-Corning Fiberglas Corporation, prays that this Court will grant its motion for judgment notwithstanding the verdict, or, in the alternative, a new trial, or, in the alternative, a remittitur of the award of damages and grant the Defendant such other, further and different relief to which it may be entitled.

Respectfully submitted,

CROSBY, SAAD, BEEBE,
CAVENDER &
CRUMP, P.C.
Attorneys for OWENS-
CORNING FIBERGLAS
CORPORATION

By: s/
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Post Office Drawer 850249
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(205) 476-3000

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of May, 1994, served a copy of the foregoing pleading to John F. Venable, Esquire, Tampa Bay Marina Center, 205 S. Hoover Blvd., Suite 403, Tampa, Florida 33609 and United States Mail properly addressed and first class postage prepaid.

s/
RICHARD M. CRUMP

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

OWENS-CORNING FIBERGLAS CORPORATION,	Case 94-02059
Appellant,	Lower Tribunal Case No. 93-9601
vs.	
CLARENCE DUDLEY and GEORGIANNA DUDLEY,	Florida Bar No. 117402
Appellees.	

MOTION FOR REHEARING EN BANC

COMES NOW, the Appellant, OWENS-CORNING FIBERGLAS CORPORATION, by and through its undersigned counsel, and pursuant to Rule 9.331(d), **Fla.R.App.P.**, moves this Honorable Court for rehearing en banc, and states:

1. This is an appeal from an amended final judgment which included a punitive damage award in the aggregate amount of $8,250,000.00. Punitive damages were awarded by the jury for alleged acts or omissions which occurred more than 25 years ago and which have been the subject of massive and repeated awards of punitive damages throughout the country.

2. Appellant presented two constitutional issues: (1) whether the Excessive Fines Clause of the Eighth Amendment to the United States Constitution was implicated by virtue of Section 768.73, **Fla.Stat.**, as suggested in *Browning-Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and *Pacific Mut. Life Ins. Co. vs. Haislip*, 499 U.S. 1 (1991), and (2) whether Appellant's due process rights under the United States and Florida Constitutions are being

violated by repeated, massive and unrelenting awards of punitive damages for the same course of conduct.

3. The panel chose to affirm the judgment in all respects with a "PCA" dated December 8, 1995. Although Appellant does not agree with the panel's decision, Appellant will not violate the letter or spirit of Rule 9.330 and reargue those matters already presented to the panel.

4. However, the implications of the Eighth Amendment by virtue of Section 768.73, **Fla.Stat.**, is a significant issue of exceptional importance in light of the staggering impact of massive awards of punitive damages not only against this Appellant but as against other defendants in mass tort litigation who may be similarly situated.

5. Furthermore, Appellant raised due process arguments under several federal and state decisions. Appellant took note of the Florida Supreme Court's decision in *W.R. Grace & Co.-Conn. vs. Waters*, 638 So.2d 502 (Fla. 1994), that the Appellant in that case was premature in its reliance on *Pacific Mut. Life Ins. Co. vs. Haislip*, 499 U.S. 1 (1991). The Florida Supreme Court suggested that the issue was premature for a variety of reasons but invited a future due process argument "based on the cumulative effect of prior awards of punitive damages." 638 So.2d at 506.

6. Consequently, the Florida Supreme Court has already recognized the exceptional importance of this issue and has invited further review in the proper case. Appellant submits that this is the proper case. Appellant has filed a Motion to certify the issue to the Florida Supreme Court but further suggests that rehearing en banc would allow this Court to address this exceptionally important matter.

7. In accord with Rule 9.331(d)(2):

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of

exceptional importance.

s/_____
Steven R. Berger, Attorney for Appellant
Florida Bar No. 117402

8. Significantly, a different panel of this Court has already questioned the "fundamental fairness" of repetitive imposition of punitive damages on corporations for conduct occurring many years in the past. *Baione vs. Owens-Illinois, Inc.*, 599 So.2d 1377, 1380 (Fla. 2d DCA 1992).

WHEREFORE, Appellant, OWENS-CORNING FIBERGLAS CORPORATION, respectfully requests this Honorable Court to grant rehearing en banc to address the exceptionally important constitutional issue raised by Appellant.

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of December, 1995, to **John F. Venable, Esquire,** 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

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Appellate Counsel for OCF
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By: s/_____
Steven R. Berger

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

OWENS-CORNING FIBERGLAS CORPORATION,

Appellant,

vs.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Appellees.

Case 94-02059

Lower Tribunal Case No. 93-9601

MOTION FOR CLARIFICATION AND/OR CERTIFICATION

COMES NOW, the Appellant, OWENS-CORNING FIBERGLAS CORPORATION, by and through its undersigned counsel, and pursuant to Rule 9.330(d), **Fla.R.App.P.**, moves this Honorable Court for clarification and/or certification, and alleges:

1. By decision dated December 8, 1995, this Court affirmed the judgment sought to be reviewed by the Appellant which said judgment included awards of both compensatory and punitive damages.

2. Although Appellant does not agree with this Court's decision, it is not the office of a Motion for Rehearing to reargue the merits of this Court's decision. Consequently, in accord with the letter and spirit of Rule 9.330(a), **Fla.R.App.P.**, Appellant will not now separately address the issues which have already been argued in the briefs and at oral argument.

3. Two of the issues raised by Appellant involved the constitutionality of further punitive damage awards against Appellant in light of the significant and continuing number of awards of punitive damages for

the same course of conduct. Appellant argued that continued imposition of punitive damage awards against it violates the Eighth Amendment to the United States Constitution and that further awards of punitive damages violates concepts of due process under the United States and Florida Constitutions.

4. By rendering a "PCA" this Court has given no guidance to the bench or bar in relation to the constitutional arguments raised by Appellant. This Court, of course, is under no obligation to specifically address issues raised in an appeal but Appellant suggests that the nature of the issues, coupled with the hundreds of millions of dollars at stake as to this Appellant and other parties similarly situated, would warrant a discussion of Eighth Amendment and due process arguments.

5. Consequently, Applicant respectfully requests this Court to clarify its "PCA" and provide some guidance to the bench and bar, as well as possible guidance for further review in this case, with reference to the significant constitutional issues raised by Appellant. Having recognized that Rule 9.330 precludes reargument, Appellant would merely point out that *Browning-Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and *Pacific Mut. Life Ins. Co. vs. Haislip*, 499 U.S. 1 (1991), among other decisions, have indicated that the Eighth Amendment is implicated by virtue of a statutory scheme such as that formerly contained in Section 768.73, **Fla. Stat.** For purposes of possible review by the United States Supreme Court it would be useful for this Court to explain why it believes that the Eighth Amendment is not implicated in the instant case or, if it is implicated, why it is not dispositive.

6. Appellant has also argued that its due process rights under the United States and Florida Constitutions have been violated and continue to be violated by repetitive, massive imposition of punitive damages for the same course of conduct which ceased approximately 25 years ago. The specific cases upon which Appellant

relied, both federal and state, are contained in the initial brief, the reply brief and the supplemental authority submitted to this court.

7. Specifically, however, the Florida Supreme Court in *W.R. Grace & Co.-Conn. vs. Waters*, 638 So.2d 502 (Fla. 1994) invited a due process argument, based on the "cumulative effect of prior awards" of punitive damages in some later case. *Id.* at 506. In essence, the Florida Supreme Court was inviting the submission of the due process arguments at some later appropriate time. Appellant believes that the instant case squarely presents the issue left unanswered by the *Waters* decision and that this Court should clarify its "PCA" to indicate reasons why it has rejected the due process arguments raised by Appellants.

8. Furthermore, to the extent that the Florida Supreme Court invited a future due process challenge, Applicant believes that the clarification of this Court's decision would allow further review by the Florida Supreme Court. Alternatively, in light of the Supreme Court's invitation for future consideration of a due process argument under the circumstances, Appellant respectfully suggests that the issue left unanswered in *Waters* should be certified to the Florida Supreme Court to allow the Court to address the unanswered question.

WHEREFORE, Appellant, OWENS-CORNING FIBERGLAS CORPORATION, respectfully requests this Honorable Court to clarify its decision affirming the judgment sought to be reviewed and/or certifying the due process issue to the Florida Supreme Court as contemplated in *W.R. Grace & Co.-Conn. vs. Waters*, 638 So.2d 502, 506 (Fla. 1994).

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of December, 1995, to **John F. Venable, Esquire,** 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

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By: s/
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Florida Bar No. 117402

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

OWENS-CORNING FIBERGLAS CORPORATION,	Case 94-02059
Appellant,	Lower Tribunal Case No. 93-9601
vs.	
CLARENCE DUDLEY and GEORGIANNA DUDLEY,	Florida Bar No. 117402
Appellees.	

MOTION TO STAY MANDATE

COMES NOW, the Appellant, OWENS-CORNING FIBERGLAS CORPORATION, by and through its undersigned counsel, and pursuant to Rule 9.310, **Fla.R.App.P.**, moves this Honorable Court to stay the issuance of mandate, and states:

1. Concurrently herewith, Appellant has filed a Motion for Rehearing En Banc and a Motion for Clarification and/or Certification. Pursuant to Rule 9.310(e), **Fla.R.App.P.**, stay of execution on the judgment remains in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated.

2. In the event that this Court grants rehearing en banc, clarification and/or certification, Appellant respectfully submits that the stay will continue in effect until conclusion of any proceedings resulting therefrom but that, in any event, mandate should be withheld pending determination of any such proceedings in order to prevent execution on the judgment. Good and sufficient supersedeas bond in more than ample amounts has been posted as required by Rule 9.310(b).

3. In the event that this Court does not grant rehearing en banc, clarification and/or certification, Appellant respectfully requests that this Court enter an order staying the issuance of mandate for a period of 60 days to allow Appellant to seek a stay of execution from the United States Supreme Court conditioned on the filing of a Petition for Writ of Certiorari in that Court. As Appellant has already pointed out to this Court by way of notices of supplemental authority, the United States Supreme Court has, on at least two recent occasions, granted stays of execution of punitive damage portions of judgments against this Appellant in cases arising in other jurisdictions, in order to allow consideration of the constitutional issues raised by Appellant.

WHEREFORE, Appellant, OWENS-CORNING FIBERGLAS CORPORATION, respectfully requests this Honorable Court to withhold the issuance of mandate pending all review in Florida appellate courts and, if such other review is not possible, to stay the issuance of mandate and continue the stay of execution under the pending supersedeas bond for a period of 60 days to allow Appellant to seek a stay of execution from the United States Supreme Court.

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of December, 1995, to **John F. Venable, Esquire,** 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

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By: s/
Steven R. Berger

IN THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

CASE NO. 94-02059

Lower Tribunal Case No. 93-9601

OWENS-CORNING FIBERGLAS CORPORATION,
Appellant,

v.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,
Appellees.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from an amended final judgment in an asbestos personal injury action rendered by the Hillsborough County Circuit Court. Compensatory and punitive damages were awarded in the total amount of $12,301,800.00. The appellant, OWENS-CORNING FIBERGLAS, was a defendant below and will be referred to hereinafter as OCF or APPELLANT. The appellees, CLARENCE DUDLEY and GEORGIANNA DUDLEY were plaintiffs below and they will be referred to collectively as DUDLEY, individually by name, or as APPELLEES.

In this brief, the symbol "R" shall stand for the record on appeal and the symbol "T" shall stand for the transcript of testimony. All emphases in quotations is furnished by counsel unelss otherwise indicated.

This brief is submitted on behalf of the APPELLANT and based upon the reasons and authorities hereinafter contained it is respectfully submitted that the amended final judgment should be reversed and the cause remanded with directions to grant a new trial on all issues and/or alternatively enter judgment in favor of OCF on the issue of punitive damages and submit the balance of the cause to retrial.

STATEMENT OF CASE AND FACTS

I. CASE

The action below was commenced on December 13, 1993, by the filing of a complaint against OCF and 10 other defendants that manufactured or distributed asbestos-containing products. (R 1-11). OCF

answered and raised as affirmative defenses, *inter alia*, comparative negligence, state of the art, and the negligence of others diminishing the responsibility of OCF in proportion to the fault attributed to those others. (R 15-23). "Exposure sheets" and amended "exposure sheets" common to asbestos litigation were filed by DUDLEY (R 65-83, 139-143). The exposure sheets identified asbestos-containing products allegedly manufacutred or sold by various manufacturers to which DUDLEY was allegedly exposed between 1971 and 1973. All exposures allegedly occurred at the Tampa shipyard.[1] By the time the cause came on for trial, all other defendants had been dropped, dismissed or otherwise eliminated from the litigation and trial proceeded against OCF only.

Prior to trial, OCF filed a notice aopting a prio motion to strike the claim for punitive damages filed in the master file for asbestos litigation (R 488-490), a motion in limine to exclude the deposition testimony of John H. Thomas, a former president of OCF (R 270-406), and a brief in support of the latter motion. (R 420-432). The motion in limine has been denied in

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[1] The products included Armabestos pipe covering, Armabestos block, Super 711 cement, Caltemp pipe covering, Caltemp block, Super Caltemp pipe covering, Super Caltemp pipe block, Flexitallic Spiral Wound Gasket, asbestos gaskets, Calsilite cement, Calsilite pipe covering, Calsilite block, Garlock Spiral Wound Gasket, Garlock Sheet Gasket, Goldbond cement, Goldbond asbestos cement siding, Unibestos pipe covering, One Shot cement, Delta Made One Shot Cement, Redtop Cement and Kaylo block and pipe covering manufactured or distributed by OCF.

each Hillsborough County asbestos case,[2] and it was revisited at trial (T 453-458). DUDLEY was permitted to use Thomas' deposition over OCF's objection. Motion for directed verdict on punitive damages was denied at the close of all evidence. (T 1182).

During the course of trial, OCF advised the court of a scheduling problem regarding one of ifs only scheduled witnesses, Jerry Helser, (T 783), stating that Mr. Helser was testigying in a Texas case and could not be in Tampa until Monday of the following week. This situation was raised on Thursday but the case was concluded on Friday. DUDLEY acknowledge that Helser had testified in prior trials and that he traveled from court to court as an OCF employee testifying in asbestos cases. (T 784). OCF asked to utilize Helser's testimony from another Tampa case involving the same plaintiffs' counsel, but the court refused. Basically, the court stated that the alternate had already replaced a juror and that he did not want to carry the case over to the following Monday. (T 788). There was no finding that APPELLEES would be prejudiced by a one day continuance. Notwithstanding OCF's representation that Helser was in Texas, the court simply stated that OCF should get its witness to trial. (T 788). OCF subsequently proffered the testimony of Helser from the earlier trial (T 1177; R 1686-1818).

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[2] The issue is pending before this court in the case of *Permuy vs. Owens-Corning Fiberglas Corporation*, Case No. 94-00904.

During the jury instruction conference, OCF requested jury instructions on, and inclusion in the verdict of, the fault of other manufacturers and distributors of asbestos-containing products. (T 1188-1195, 1199). The court denied OCF's requests.

After receiving instructions and deliberating approximately two hours, the jury returned a verdict against OCF finding that it had been negligent and that it had placed Kaylo on the market with a design defect. The jury found no comparative negligence as to DUDLEY and awarded total compensatory damages to MR. DUDLEY in the amount of $2,750,000.00, and to MRS. DUDLEY, $1,510,000.00. The jury also awarded punitive damages in the amount of $15,000,000.00 (1307-1308). Post-trial motions were directed to the verdict (R 704-712, 723-726) and the amended final judgment followed. (R 733-734). This timely appeal followed. (R 736-743).

II. FACTS

DUDLEY was a sheet metal worker emloyed at the Tampa Shipyard in June, 1971. (T 223-224). Although he had been in the Navy and the Merchant Marine between 1944 and 1948 (T 221-222), he claimed that his only exposure to asbestos-containing products occurred in or around 1972 when he worked in the engine and boiler rooms of tankers and cargo ships (T 225). DUDLEY did not work with any asbestos-containing products himself, but he claimed to be close to people who were applying insulation, that application of insulation resulted in asbestos-containing dust and that he breathed the dust. (T 225-226). DUDLEY did not know the names of any of the

products or any of the manufactureres of products being used at the shipyard in 1972. (T 228). Although DUDLEY used face masks when he was in the vincinity fo the gringing of fiberglass (T 254-255), he never wore a mask when working in proximity to insulation workers. (T 255).

Thomas Keene was also employed in the Tampa shipyards in 1972 as a boilermarker. (T 560). He installed insulation products and saw other workers applying insulation products in the ships. (T 560). Keene identified Kaylo pipe covering by name as one of the insulating products used in the ships. (T 561, 570). Keene saw DUDLEY in the engine and boiler rooms on many occasions when insulating products were used. (T 567). Keene claimed that he did not observe any warning of any type on boxes of Kaylo in 1972.[3] (T 567). It was Keene's recollection that Kaylor was used as the predominate pipe covering in the shpyard and that perhaps 65% to 70% of the peipe covering was Kaylo. (T 570).

Keene, however, also saw and worked with asbestos-containing cement and cloth, as well as asbestos-containing gaskets. (T 571-572). The cloth, Garlock Sheet Packing and Flexitallic gaskets gave off some dust during installation and the gaskets gave off a considerable amount of dust in removal. (T 572). Pipe covering that was used on the job was made by Keene Corporation, Carrie (sic) and OCF but he could

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[3] It was uncontroverted that OCF placed warnings on boxes of Kaylor in 1967 (T 1058), years before OSHA required such warnings. (T 1124).

not remember other names. (T 581-582). All pipe covering was white once it was removed from the box regardless of the manufacturer. (T 583-584). Additionally, Johns-Manville blue mud was used, and the blue mud created dust when it was mixed. (T 586-588). Numerous types of asbestos-containing cements were used including Power House and One Coat. Eagle Pitcher was one of the manufacturers, as were Johns-Manville, Unibestos and Carrie (sic) temp. (T 590-591). Keene admitted that the shipyard provided cloth masks to the workers (T 590-591), but he claimed that no safety meetings were ever held and no warnings or instructions were ever given to the workers by the employers. (T 590-595). The workers "very seldom" used masks. (T 593). Keene never saw warning labels on any of the boxes or containers of asbestos-containing materials regardless of the manufacturers. (T 595).

Conflicting evidence was presented regarding the hazard associated with asbestos, the knowledge of the medical community, industry and science at various periods in history, and the efforts of OCF to remove asbstos from Kaylo, its only asbestos-containing product (e.g., T 450, 483-384, 486-491, 515, 522, 524-525, 632-635, 638-641, 644-655, 674-677, 702, 729-732, 733-737, 769, 801-809, 895-902, 915, 1015, 164-174, 1108, 1112-1113, 1114, 1124). Medical evidence was also presented to demonstrate the MR. DUDLEY had developed mesothelioma from his short exposure to asbestos-containing fibers in 1972. (E.g. T 290, 292, 297-298, 301, 304-306, 333, 335, 346-347, 403, 407, 410, 420, 610-611, 612, 622). Solely for purposes of this appeal, and without waiving

any arguments respecting any of the pretrial or intra-trial rulings on evidentiary or other matters, OCF will assume *arguendo* that the evidence was sufficient to support DUDLEY's theory. However, in determining whether the trial court erred in failing to grant a continuance or in failing to allow OCF to use the testimony of Jerry helser from a recently concluded trial involving the smae plaintiffs' attorney, OCF deems it necessary to point out certain portions of Helser' testimony as proffered. Mr. Helser is an employee of OCF attached to its residential and commercial roofing laboratory. He was involved with the production of Kaylor and efforts by OCF to replace asbestos in Kaylo. He is the only remaining OCF employee from the time when OCF was attempting to replace the asbestos fibers. (Exhibit 43, p. 1617).

Helser described the manufacturing process involved with Kaylo (Exhibit 43, pp. 1619-1642). In the late 1960's he was a project manager working on various projects for OCF including the attempt to replace asbestos fibers in Kaylo. (Exhibit 43, p. 1623). He described the uses of Kaylo as a high temperature insulating material (Exhibit 43, page 1626-1627) and compared it with other insulation products that would not withstand high termperatures. Helser stated that OCF started to manufacture asbestos-free Kaylo in November, 1972. (Exhibit 43, page 1628). Significantly, he stated that in the 1960's, all high temperature thermal insulation contained asbestos. (Exhibit 43, p. 1637).

Helser described all of the attempts to create a comparable product without the use of asbestos. (Exhibit 43, pp. 1639, 1642, 1648). He recounted

each of the problems encountered by OCF in its attempts to utilize material other than asbestos. Additionally, Helser testified that the word "caution" first appeared on a warning on a Kaylo box in 1970. (Exhibit 43, p. 1658). Helser was the individual who ordered the first warning stamp used on boxes of Kaylo, and he described the directive he received, the purchase of the stamp, the contents of the warning and the eventual use of boxes with a pre-printed warning. (Exhibit 43, pp. 1664-1671). Obviously, there were many fine points relating to the production and distribution of Kaylo, Mr. Helser's various jobs and duties, and conditions at the plant where Kaylo was manufactured. It is extremely important to bear in mind that Helser would have been the only living corporate employee able to testify about the matters contained in the proffered transcript and that counsel for DUDLEY emphasized the fact that no OCF employee testified at trial.

SUMMARY OF THE ARGUMENT

This personal injury, asbestos exposure case involves an award of compensatory and punitive damages in the total amount of $12,301 ,800.00. MR. DUDLEY was diagnosed with mesothelioma - a form of cancer often associated with inhalation of asbestos fibers and which is usually fatal. He was allegedly exposed to an OCF asbestos-containing product for a short time in 1972.

The trial court committed multiple harmful errors which require that this Court reverse the amended judgment. Initially, the trial court failed to apply §768.81 Fla. Stat., as interpreted in *Fabre*. Sufficient evidence would have allowed a jury to conclude that a

substantial part of DUDLEY's inhalation of asbestos fibers came from products manufactured or distributed by others. Evidence also demonstrated that DUDLEY's employers made no attempt to provide a safe working environment and they, too, should have been allocated a portion of responsibility. Indeed, DUDLEY's exposure to asbestos was of such short duration, at a single location, that it is inconceivable that a jury would not apply the same negligence or strict liability standards to other manufacturers and distributors. This error mandates a new trial.

Furthermore, the trial court allowed DUDLEY to utilize portions of the deposition of a prior president of OCF taken in another action. That deposition was taken at a time when the gentleman was 83 years of age and suffered mental disabilities which rendered his opinions and recollection untrustworthy. A motion in limine was addressed to the deposition and the use of the deposition was objected to during trial. The trial court committed reversible error in denying the motion in limine and in refusing to sustain the objections during trial. Mr. Thomas was incompetent to testify at the time he gave his deposition or, in the alternative, any marginal competency was far outweighed by the unfair and highly prejudicial impact of the confused and incorrect testimony of Mr. Thomas. The error becomes even more important in light of the fact that the trial court also abused its discretion in denying a one day continuance to allow OCF to present a critical witness. The witness was in Texas testifying in another case and could not be in two places at the same time. Alternatively, OCF suggested the use of a transcript of the testimony given by the witness in a

recent Tampa trial in which the witness was cross-examined by the same attorney representmg DUDLEY. DUDLEY's objection to use of the transcript was sustained and OCF was severely curtailed in its ability to defend this significant litigation. In fact, DUDLEY emphasized in closing argument the failure of OCF to bring a corporate witness to trial. Either of these evidentiary ruling require a new trial and together they cry out for the grant of a new trial.

Beyond these issues, this case presents a number of constitutional infirmities in continued awards of punitive damages against OCF for the same course of conduct. OCF moved to strike the claim for punitive damage and moved for a directed verdict at the close of all evidence. OCF also addressed post-trial motions to the constitutionality of further awards of punitive damage against it in asbestos litigation.

OCF has been repeatedly punished and has been subjected to "overkill" in the imposition of punitive damages for the same course of conduct which ended more than 20 years ago. The award of punitive damages in this case violates the Excessive Fines Clause of the Eight Amendment and Due Process Clause. It is also contrary to Florida's own constitutional Declaration of Rights. The time has now come for this Court to say: "enough is enough." Whether this Court grants a new trial on all issues, as OCF believes the Court should do, the Court should reverse the judgment for punitive damages and determine that further awards of punitive damages against OCF for the same course of conduct are no longer constitutionally permissible.

ARGUMENT

POINT I. WHERE THERE IS EVIDENCE THAT NEGLIGENCE OF NON-PARTIES SUBSTANTIALLY CONTRIBUTED TO A PLAINTIFF'S INJURIES, THE TRIAL COURT ERRS IN REFUSING TO ALLOW THE JURY TO CONSIDER THE NEGLIGENCE OF THE NON-PARTIES AND IN FAILING TO INCLUDE THEM ON THE VERDICT FORM.

Section 768.81(3), Fla. Stat. (1989) provides that the jury must apportion liability among all parties potentially responsible for a plaintiff's injury, whether or not they are present at trial. The doctrine of joint and several liability continues to apply to economic damages with respect to any party whose percentage of fault equals or exceeds that of the plaintiff but as to non- economic damages, judgment must be entered only on the basis of a defendant's percentage of fault. This section was interpreted in *Fabre vs. Mafln,* 623 So. 2d 1182 (Fla. 1993) and *Allied Signal, Inc. vs. Fox,* 623 So. 2d 1180 (Fla. 1993), to require a jury to apportion liability among all persons or entities responsible for a particular plaintiff's injuries whether they are parties to the litigation, former parties, non-parties or even parties who may be immune from suit. In the instant case, the jury awarded APPELLEES substantial sums for both economic and non- economic damages. (T 1307-1308). The trial court refused to allow the jury to consider the fault, if any, of the multitude of other manufacturers or distributors of asbestos-containing products to which DUDLEY was exposed. In refusing to grant OCF's requested jury

instructions and verdict forms regarding the other manufacturers and distributors, the trial court committed reversible error.

As the record demonstrates, DUDLEY originally filed suit against 11 defendants that allegedly manufactured or distributed asbestos-containing products. DUDLEY's "exposure witness" testified that DUDLEY was exposed to asbestos from many products other than those manufactured or distributed by OCF. Mr. Keene specifically remembered some products by name, and his recollection was refreshed as to others. Additionally, Keene testified that none of the products contained warnings, and no safety instructions were provided by the employer or representatives of the federal government who appeared at the job site. OCF submits that the jury should have been allowed to consider the fault, if any, of the other manufacturers and distributors in apportioning responsibility. Some fault could also have been attributed to MR. DUDLEY's employers. The trial court's error requires a new trial.

Although it is clear that a defendant must present evidence sufficient to allow a jury to consider the liability of non-parties, i.e., *W.R. Grace & Co. - Conn. vs. Dougherty,* 636 So. 2d 746 (Fla. 2d DCA), *review denied, 645* So. 2d 454 (Fla. 1994), OCF submits that there was sufficient evidence to allow the jury to apportion at least some responsibility to other entities. There was uncontradicted evidence that each exposure to asbestos can be a substantial contributing cause of mesothelioma, and the evidence and testimony

was equally compelling as to the other manufacturers and at least as legally sufficient.[4] All entities were subject to the same state of the art testimony. The same evidence would have allowed the jury to determine that the other manufacturers and distributors or employers were, to some degree, responsible. See *Allied-Signal, Inc. vs. Fox,* 623 So. 2d 1180 (Fla. 1993); *Schindler Corp. vs. Ross,* 625 So. 2d 94 (Fla. 3d DCA 1993); and see, *A.W. Chesterton vs. Fisher,* 19 FLW D2113 (Fla. 3d DCA, October 5, 1994); *Dewitt Excavating, Inc. vs. Walters,* 642 So. 2d 833 (Fla. 5th DCA 1994); *East West Karate Assoc. Inc. vs. Riquelme,* 638 So. 2d 604 (Fla 4th DCA 1994).

A party is entitled to have the jury instructed on any issues supported by any competent evidence or reasonable inferences from the evidence. Failure to give a proper instruction, or to utilize a proper verdict form, will result in reversal if evidence supported the requested instructions or verdict form. E.g., *Robinson vs. Gerard,* 611 So. 2d 605 (Fla. 1st DCA 1993); *Harnly vs. Watson,* 519 So. 2d 18 (Fla. 2d DCA 1988); *Harwell vs. Blake,* 180 So. 2d 173 (Fla. 2d DCA 1965). In the instant case, very substantial evidence and testimony supported OCF's contention that others were partially at fault and responsible for DUDLEY's exposure to asbestos. No warnings were given by other manufacturers or employers. OCF submits that the judgment must be reversed and the cause remanded for a new trial because the trial court

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[4] See *Ward v. Celotex Corp.*, 479 So. 2d 294 (Fla. 1st DCA 1985).

failed to grant OCF's requested jury instructions and/or failed to include other potentially responsible parties on the verdict form as required by *Fabre* and Section 768.81(3).

POINT II. WHERE A WITNESS IS SHOWN TO BE INCOMPETENT, HIS TESTIMONY SHOULD NOT BE ADMITTED; ALTERNATIVELY, EVEN IF A WITNESS IS MARGINALLY COMPETENT TO TESTIFY, *ARGUENDO*, IF THE PREJUDICIAL EFFECT OF HIS TESTIMONY WILL OUTWEIGH THE PROBATIVE VALUE, IT SHOULD BE EXCLUDED FROM JURY CONSIDERATION.

OCF filed a motion in limine to exclude the deposition testimony of John H. Thomas from jury consideration. The issue was revisited during trial. Ultimately, the trial court allowed select portions of the Thomas deposition to be read to the jury. OCF submits that Thomas was incompetent to testify as a witness or that, alternatively, the probative value of the marginally competent testimony was far outweighed by the prejudicial effect to OCF. Consequently, the judgment must be reversed and the cause remanded for a new trial.

The motion in limine and the brief in support of it, including attachments, demonstrated that John Thomas was the president of OCF from November 1, 1967, to August 19, 1971. On April 3, 1991, he was deposed as a part of discovery for several cases pending in the United States District Court for the Eastern District of Virginia. Thomas did not waive the reading and

signing of his deposition, and when it was presented to him he made the following disclaimer under oath.

> After reviewing the foregoing transcript I cannot sign it. I did have periods of confusion regarding the questions stated here. Based upon my physician's recommendation, I cannot attest to the complete accuracy of my responses.

Mr. Thomas was 83 years of age at the time of his deposition and, unfortunately, he died five months after giving his deposition. At the time of the deposition, he suffered from multiple medical problems for which he had been treated by his personal physician since November, 1988. That physician, Dr. Gary Parsons, executed an affidavit attached to the brief in support of the motion in limine as Exhibit B. In that affidavit, Dr. Parsons stated that he performed neurological examinations on Mr. Thomas on both November 6, 1990 (prior to the deposition) and April 29, 1991 (after the deposition). Based on the medical findings from those examinations, Dr. Parsons was satisfied, within a reasonable degree of medical certainty, that Thomas' memory was impaired from at least November 6, 1990. According to Dr. Parsons, such memory impairment rendered the testimony given by Thomas untrustworthy. After the deposition, Dr. David Perlmutter conducted a neurological examination and, based upon that examination and his review of all medical records, tests and laboratory studies, it was his opinion that Thomas suffered from a fairly advanced dementia (moderate) based on multiple strokes, advanced cerebral atrophy and possible

contribution by long exposure to alcohol complicated by advanced age.

The deposition transcript demonstrates Mr. Thomas' numerous memory lapses and mental confusion. He was unable to give correct testimony concerning such basic historical information as his date of birth or age. He testified that he was born in 1909 and that he was 43 years of age. Actually, he was born in 1907 and was 83 years of age at the time of his deposition. He also testified that he had been "in the last business" for 43 years when, in reality, he worked in the "last business" for 33 years. Thomas also gave incorrect and inconsistent testimony regarding the offices which he held with OCF and the times that he served in various capacities. He asserted that he became president and then chief executive officee in the mid-1960's. Later he said that he was made president in 1963 or 64 and served as president from 1965 to 1970. He claims to have become chief operating officer in 1970. In reality, he was president from 1967 until 1971, and he was never chief executive officer of OCF. Thomas also testified that at the time of his deposition, he owned 40,000 to 50,000 shares of OCF stock when in reality he owned no shares at all in his own name and only 1,516 shares as settlor of an inter-vivos trust.

The confusion continued when questions were directed at specific knowledge of asbestos and alleged hazards from breathing asbestos fibers. For example, in the midst of questioning about labels on Kaylo products, Thomas testified:

> Never knew that they were planning on a label or that they were putting one out. Didn't know anything about labelling anyway except I have one hell of a time reading the cautions because they got the print so goddamn fine that you can't read them.

When OCF's counsel asked Thomas what he was talking about, Thomas, responded "my medicine mostly." In response to a question about attempts by OCF during the 1940's to combine asbestos and fiberglass, Thomas rambled into a dissertation about mittens to pick up hot plates "and the whole big thing I remember when I was a kid, Nickelodeon in our town, when the show was over the curtain came down and said asbestos. And that's supposed to save us." He later volunteered "that's when Nickelodeon costs a nickel."

On the critical question of OCF's knowledge of the hazard of asbestos, Thomas' testimony contradicted itself so frequently and diametrically that it compels the conclusion that Thomas could not correctly recall past events. For example, Thomas testified that he had no independent recollection of discussions concerning the hazards of asbestos in the 1940's and 1950's and that he did not recall any animal studies showing that Kaylo dust could cause lung disease in laboratory animals. He also testified that he did know in the 1940's that asbestos dust could cause sickness in insulators. Still later he testified that he was not involved with OCF's products prior to 1964 and that he had no occasion to know about animal studies purportedly demonstrating hazards associated with asbestos before that time.

These are but a few examples of the obvious confusion demonstrating the mental impairment and untrustworthiness of Mr. Thomas' deposition.

Under the Florida Evidence Code, every person is presumed to be competent to testify. Section 90.601, Fla. Stat. (1985). The question of competency is to be determined by the trial court under Florida law. E.g., *Cllnton vs. State,* 53 Fla. 98, 43 So. 312 (1907). Most Florida decisions dealing with the issue of competency have dealt with the proposed testimony of infants and children. Of the few cases touching on the question of the competency of an adult, most merely state that credibility is an issue to be argued to the jury. In so doing, the reported appellate decisions generally give great deference to the trial court's ability to see the witness, view the witness's demeanor, facial expressions and body language, and otherwise observe first hand whether the witness appears to be competent. Respectfully, those cases have no bearing on the question of whether the deposition of a now-deceased witness may or may not be read to a jury.[5] The trial court had no more opportunity to observe Thomas than does this Court. Thus, OCF submits that the ordinary presumptions favoring the exercise of a trial court's discretion do not apply here because that this Court is

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[5] There appears to be only one reported decision dealing with this deposition despite the fact that its use is an issue in almost every OCF asbestos trial. That decision is *In re Asbestos Litigation*, 1992 Del. Super. LEXIS 488 (October 26, 1992). In the decision, the trial court adopts virutally every argument made by OCF in this case.

in the same position as the trial court in determining the question of competency.

Even if this Court were to determine that Thomas was marginally competent to testify, and that the inconsistencies and misstatements in his deposition were merely items to be argued regarding credibility, §90.403 of the Florida Evidence Code provides that when the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or needless presentation of cumulative evidence, it is inadmissible. OCF submits that confused, incompetent, unresponsive and demonstrably erroneous testimony of a former corporate president has such a tendency to create unfair prejudice that any limited probative value is far overshadowed by the prejudicial effect. This is not unlike the case of *Simmons vs. Baptist Hospital of Miami, Inc.*, 454 So. 2d 681 (Fla. 3d DCA 1984), where the court found that the limited probative value of the evidence at issue in that case "even if marginally relevant, was entirely outweighed by its unfairly prejudicial character . . ." 454 So. 2d at 682. See also, *Watson vs. Builders Square, Inc.*, 563 So. 2d 721, 723 (Fla. 4th DCA 1990); *La Reina Pharmacy, Inc. vs. Lopez*, 453 So. 2d 882 (Fla. 3d DCA 1984); *Zabner vs. Howard Johnson's Inc. of Florida*, 227 So. 2d 543 (Fla. 4th DCA 1969); and see, *Perper vs. Edell*, 44 So. 2d 78 (Fla 1950).[6]

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[6] See *In re Asbestos Litigation, supra*, which notes that some trial courts have admitted this deposition while others have exlcuded it. The court there seemed to say that other courts which had admitted the deposition had not read

The issue of liability was hotly contested. To the extent that the deposition of OCF's former president presented a confused and misleading picture to the jury, it had to result in prejudice to OCF far outweighing any probative value. In fact, the jury took just about two hours to award a total of $19,260,000.00. This may well have been based upon a determination that the Thomas deposition established OCF's knowledge of some type of hazard long before reasonable knowledge was actually changeable to OCF. This is even more likely when this court considers the inability of OCF to present a critical live witness. See Point III, infra. The failure to exclude the deposition of Mr. Thomas is sufficient to require a new trial, particularly because DUDLEY highlighted the Thomas testimony in closing argument (e.g., T 1216, 1220).

POINT III. THE COURT ERRED IN REFUSING TO CONTINUE TH ETRIAL FOR ONE DAY TO ALLOW OCF TO PRESENT CRITICAL TESTIMONY OR, ALTERNATIVELY, IN REFUSING TO ALLOW OCF TO USE A TRANSCRIPT OF THE WITNESS'S TESTIMONY FROM A PRIOR TRIAL.

During trial, OCF told the court that its corporate witness, Jerry Helser, was in trial in Texas and could

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the full transcript or medical affidavits in order to balance the probative value against the unfair prejudice and confusion.

not be present until Monday, thereby necessitating a continuance over the weekend. The court refused, stating that one of the jurors had become ill, and with no alternate left, the case would have to conclude on Friday. OCF alternatively requested permission to utilize a transcript of Mr. Helser's testimony from a prior trial involving the same plaintiffs' counsel THAT had only recently been given in Tampa. DUDLEY successfully objected to use of the transcript. Consequently, OCF was forced to conclude its defense without a critical witness. In the context of mass tort litigation, where corporate employee witnesses may be called upon to testify repeatedly in diverse jurisdictions, it is manifestly unfair to refuse a simple request to adjourn for the weekend to allow presentation of live testimony or, alternatively, to refuse to allow testimony from a prior trial involving the same plaintiffs' lawyer and the same issues to be read in lieu of live testimony.

In the instant case, DUDLEY acknowledged that he had previously cross-examined Helser (T 784) but failed to accept an accommodation that would allow OCF to defend itself. Having successfully prevented OCF from presenting this witness, DUDLEY's counsel then proceeded to argue to the jury that while he had presented the testimony of OCF's former president [see Point II, supra], and that OCF spends millions of dollars on defense of these cases, OCF nonetheless brought no doctor in to testify and that nobody from OCF had testified -- the only defense testimony being that of two "hired witnesses." (T 1216-1218, 1282). The jury was obviously coaxed to believe that only DUDLEY was in a position, or cared enough, to bring

live witnesses to trial and that OCF was willing to spend millions of dollars to defend cases but was not willing to send a corporate employee to trial. DUDLEY set the stage and cast OCF's counsel in an impossible role. The result was a "bad review" from the jury!

The granting or denying of a motion for continuance is within the sound discretion of the trial judge. Ordinarily, absent an abuse of discretion, an appellate court will not substitute its judgment for that of the tiral judge. E.g., *Edwards vs. Pratt*, 335 So. 2d 597 Fla. 3d DCA 1976). Nonetheless, egregious situations have led to reversal. In the criminal context, *Robinson vs. State*, 561 So. 2d 419 (Fla. 1st DCA 1990) is a prime example. After a jury had been selected, defense counsel "brought to the court's attention" the absence of a witness who had been subpoenaed. Id. at 420. A few days later, defendant moved for a continuance and alleged that the witness had still not been located. The trial court denied a continuance but gave the defense 24 hours to secure the witness's presence. When the parties appeared before the court 24 hours later, defendant renewed his motion for continuance, the court denied the motion and defendant was convicted. The First District reversed, finding it a palpable abuse of discretion to force a defendant to trial without the testimony of a critical witness.

In *Outdoor Resorts at Orlando, Inc. vs. Hott Management Co., Inc.*, 483 So. 2d 2 (Fla. 2d DCA 1985), this Court granted a writ of certiorari and quashed an order denying a motion for continuance. The motion in that case alleged that a corporate witness would be unavailable due to illness. This Court

recognized that the granting or denying of a motion for continuance is customarily within the discretion of the trial court but that where there is a "risk of an injustice" by requiring a party to proceed to trial without a material witness, such risk of injustice would outweigh this Court's policy of not interfering with the exercise of this type of discretion. Because the trial in that case was being conducted without a jury, this Court noted that the parties could avoid the problem by allowing the case to proceed by offering the absent witness' testimony by way of deposition at a later time. See also *Thompson vs. General Motors Corp.*, 439 So. 2d 1012 (Fla. 2d DCA 1983).

OCF submits that the trial court abused its discretion when it refused to recess on Friday afternoon to allow OCF to present Mr. Helser as a live witness on Monday morning. The transcript reflects that the jury retired to deliberate at 6:10pm on Friday and returned with its verdict at 8:15pm. It would have been a simple matter to allow the case to conclude on Monday morning. It was not necessary for the court to grant a lengthy delay; all that was necessary was a weekend's break. This Court should engage in the "balancing of interests" articulated in *Outdoor Resorts at Orlando,* 483 So. 2d at 3, and reverse the judgment. DUDLEY opportunistically emphasized to the jury in closing argument that OCF had failed to bring any corporate employees to court to testify. There is a strong likelihood that a verdict of this magnitude resulted from the jury's belief that OCF exhibited a cavalier

approach to this litigation by failing to send a single live corporate wimess to testify.[7]

POINT IV. THE PUNITIVE DAMAGE AWARD IMPOSED AGAINST OCF VIOLATES THE EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW.

A. The Excessive Fines Clause of the Eighth Amendment Imposes Limitations on Punitive Damage Awards When the State Has a Right to Recover a Share of the Damages Awarded.

The Excessive Fires Clause of Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The State of Florida receives a share of a punitive damage award by operation of Section 768.73, Fla. Stat., and this subjects the award

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[7] Space limitations prevent full briefing of the recurring question of the use of testimony or depositions in prior cases involving the same or similar issues, the same plaintiffs' attorneys, but different named plaintiffs. OCF adopts by reference its motion to admit prior testimony (R 484-485) and brief in support thereof (R 238-269). On occasion, it is impossible to fully brief and argue each point which an appellant may deem to be significant because of the 50 page limitation on initial briefs and the reluctance of appellate courts to allow the filing of substantially enlarged briefs. OCF submits that the arguments in the brief filed in the trial court more than amply demonstrate the reasons why, as a minimum alternative, the trial court should have allowed OCF to utilize Mr. Helser's testimony from the prior trial.

to the Eighth Amendment. As will be shown below, the textual antecedents of the Excessive Fines Clause of the Eighth Amendment establish that the Clause was intended and designed to prohibit the arbitrary imposition of excessive monetary punishments, including punishments imposed in the form of punitive damages.[8]

Although the Cruel and Unusual Punishments Clause has been the subject of extensive constitutional litigation, the Supreme Court has had occasion to consider the specific application of the Excessive Fines Clause only three times since the Eighth Amendment's ratification in 1791, all in the past five years. See *Browning-Ferris Indus. of Vt., Inc vs. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) ("[T]his Court has never considered an application of the Excessive Fines Clause); *Austin vs. United States,* 113 S. Ct 2801 (1993); *Alexander vs. United States,* 113 S. Ct. 2766 (1993). In *Aetna Life Insurance Co. vs. Lavoie,* the Supreme Court recognized that a challenge to punitive damages as excessive under the Eighth Amendment "raise[d] important issues which, in an appropriate

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[8] The Excessive Fines Clause of the Eighth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. The Supreme Court has held specifically that the Cruel and Unusual Punishments Clause of the Eighth Amendment applies to the States, and has assumed the same result for the Bail Clause. See *Schilb vs. Kuebel,* 404 U.S. 357, 365 (1971) (Bail Clause); *Robinson v. California,* 370 U.S. 660, 667 (1962) (Cruel and Unusual Punishments Clause). Nothing in case law or logic could suggest that the prohibition against excessive fines would not also be applied to the States.

setting, must be resolved." 475 U.S. 813, 828-829 (1986).

The Supreme Court recently rejected the proposition that the Excessive Fines Clause applies only to criminal proceedings. See *Austin*, 113 S. Ct. at 2804. *Austin* raised the issue whether the Government's ability to exact criminal punishment using the mechanism of *in rem* civil forfeiture proceedings implicated the Excessive Fines Clause of the Eighth Amendment. The Court ruled that the excessive Fines Clause does contemplate limits on such monetary punishments and reasoned that the applicability of the Eighth Amendment does not turn on whether a particular proceeding is civil or criminal, but on whether the sanction imposed can be classified as "punishment." 113 S. Ct at 2805-2806. Observing that the common "'notion of punishment ... cuts across the division between civil and criminal law,'" the Court concluded that the "'Excessive Fines Clause limits the Government's power to extract payments" whenever imposed as "'punishment for some offense.'" Id. at 2805 (quoting *United States vs. Halper*, 490 U.S. 435, 447-448 (1989), and *Browning-Ferris*, 492 U.S. at 266-267). *Austin* stands for the proposition that any monetary punishment imposed by or payable to the Government is subject to the limitations of the Excessive Fines Clause.

The Supreme Court's interpretation and application of the Excessive Fines Clause in *Austin* follows the course charted by that Court four years earlier in *Browning-Ferris*. In *Browning-Ferris*, the Court suggested that the Excessive Fines Clause places constitutional limitations on monetary punishments

imposed in the form of civil punitive damages if the government is entitled to a share of the award. *Browning-Ferris* 492 U.S. at 268. The *Browning-Ferris* Court determined that the Excessive Fines Clause does not "constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded· Id. at 264. However, the Court specifically reserved judgment on the issue whether the Excessive Fines Clause was intended to limit monetary punishments either "directly imposed by" or "payable to" the government. Id. at 268. This case raises the specific issue reserved in *Browning-Ferris:* whether the Excessive Fines Clause constrains the imposition of punitive damage awards in civil cases where the State takes a share of any exemplary damages awarded.

1. Punitive Damages Assessed in Florida Courts Pursuant to Florida Statute Section 768.73 Are Monetary Punishments Subject to Constitutional Limitation by the Excessive Fines Clause of the Eighth Amendment.

Commonalties between punitive damages and traditional criminal punishments include: the punitive purposes served by exemplary damages combined with the use of the State's machinery for procuring them. As their name suggests, and as historically understood, punitive damages serve the same punitive goals as criminal punishments. The Supreme Court has recognized that "punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible

conduct and to deter its future occurrence." *International Bhd. of Elec. Workers vs. Foust,* 442 U.S. 42, 48 (1979) [quoting *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)].[9]

Under Florida law, "the availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs. . . [where the acts sanctioned] authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly." *Ingram vs. Peitit,* 340 So. 2d 922, 923-24 (Fla. 1976). Indeed, under Florida law a "defendant does have a right to be free from unreasonable **punishment** inflicted by an excessive **punitive damages** award." *St. Regis Paper Co. vs. Watson,* 428 So. 2d 243, 248 (Fla. 1983).

Given the purpose of punitive damages, it is entirely appropriate to classify them as monetary punishments triggering a need for constitutional review under the Excessive Fines Clause. In the wake of *Browning-Ferris* and *Austin,* it is evident that the sphere of such monetary punishments encompasses more than the modern notion of punitive fines or even forfeitures, but

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[9] See also, *Memphis Community School Dist. vs. Stachura,* 477 U.S. 299, 306 n.9 (1986) ("purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior"); *Smith vs. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("punitive damages are quasi-criminal and punitive fine[s] that provide "a windfall to plaintiffs") (internal quotations omitted); *Rosenbloom vs. Metromedia, Inc.,* 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages "serve the same function as crrminal penalties and are in effect private fines").

instead includes mandatory monetary payments payable to a sovereign, that punitive damages "can only be explained as serving in part to punish." *Austin,* 113 S. Ct. at 2805-2806. See *Browning-Ferris,* 492 U.S. at 265. The Court recognized in *Browning-Ferris* that a distinction of constitutional dimension exists between punitive damages imposed in suits between private parties where the plaintiff is entitled to the entire punitive damage award, and punitive damages awards where the State collects a portion of the award.[10]

Under §768. 73(2)(b) Fla. Stat., the State of Florida is entitled to 35% of any punitive damages awarded. The Florida Legislature has thus taken affirmative steps to ensure that punitive damage awards paid by civil defendants are diverted to public purposes in addition to providing a reduced windfall to the plaintiff. In upholding the constitutionality of §768.73(2), the Supreme Court has correctly noted that "[u]nlike that right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy," subjecting the very

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[10] In her partial dissent in *Browning-Ferris,* Justice O'Connor noted that the *Browning-Ferris* majority's reliance on the "distinction between governmental involvement and purely private suits" suggested that the Excessive Fines Clause will place some limits on the awards of punitive damages that are recovered by a governmental entity." *Browning-Ferris,* 492 U.S. at 298-99 (O'Connor, J., dissenting). Justice O'Connor characterized the majority's conclusion that the Excessive Fines Clause imposes no restrictions on the amount of punitive damages that can be awarded in suits between private parties "neither compelled by history nor supported by precedent." Id. at 283 (O'Connor, J., dissenting).

existence of a claim for punitive damages to the prerogative of the State Legislature. *Gordon vs. State,* 608 So. 2d 800, 801 (Fla. 1992), *cert. denied,* 113 S.Ct. 1647 (1993). The Court concluded that §768.73(2) bears a rational relationship to legitimate legislative objectives, among them "to alot the public weal a portion of damages designed to deter future harm to the public." Id. at 802. Of course, the Florida Supreme Court's description of the objective of §768.73(2) is entirely consistent with the notion of punitive damages as monetary punishments. As the Third District wrote in *Gordon,* "it is clear that the present statute is founded upon and directly serves one of the most basic justifications for punitive damages in the first place: to serve as punishment for what amounts to a public wrong, and thus to protect the public by inhibiting future such conduct." *Gordon vs. State,* 585 So. 2d 1033, 1036 (Fla. 3d DCA 1991) (footnote omitted), *affirmed,* 608 So. 2d 800 (Fla. 1992), *cert. denied,* 113 S. Ct. 1647 (1993).

The structure of §768.73 reflects the Florida Legislature's judgment that the State's interest in a punitive damage award stands on equal footing with that of the injured plaintiff. First, the statute allocates the proceeds of a punitive damage award roughly equally between the State and the injured party, with the State receiving 35 % of the award and the injured party receiving approximately 44% of the award (after reduction for standard attorneys' fees). See, Sections 768.73(2)(b) and (7), Fla Stat. Second, if any part of an award of punitive damages is uncollectible, the injured party and the State are each entitled to a proportional share of the punitive damages actually

collected. §768.73(6), Fla. Stat.[11] The State's share of the punitive damages awarded in this case is $2,887,500.00. Indeed, in cases currently on appeal throughout Florida, millions of dollars in punitive damages against OCF are at issue and the State stands to gain substantial revenue by virtue of the operation of Section 768.73(6).[12]

B. The History of the Excessive Fines Clause Informs the Standard for Evaluating the Constitutionality of Excessive Monetary Punishments.

Because the Excessive Fines Clause places constitutional limitations on the size of punitive damage awards in this case, this Court must determine whether these punishments are "excessive" under the Excessive Fines Clause. In its consideration of the application of the Excessive Fines Clause in three cases over the last five years, the Supreme Court has declined to establish any particular test for excessiveness, deeming it prudent to "allow the lower courts to consider that question in the first instance." *Austin,* 113 S. Ct. at 2812 [citing *Yee vs. City of Escondido,* 112 S. Ct. 1522 (1992)]; see also

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[11] Similarly, if a case settles after a verdict awarding punitive damages has been returned, § 768.73(4) entitles the State to a 35% share of the portion of the settlement amount that the punitive damage proportion of the verdict bore to the total of all damages in the verdict.

[12] For example, in the First District alone at least five appeals are pending in cases where juries awarded approximately $10,000,000.00 in punitive damages against OCF.

Alexander, 113 S. Ct. at 2776. Faced with the Supreme Court's invitation to define the meaning of "excessiveness" under the Eighth Amendment, this Court should look to the history of the Excessive Fines Clause, and particularly, to the abuses that particular provision was intended to guard against, to determine standards for its application to punitive damage awards. See generally, 4 R. Rotuda & J. Nowak, Treatise on Constitutional Law 6661 (1992) (clauses of the Constitution should be construed in light of the mischief leading to their adoption) (citing *Jarrolt vs. Moberly,* 103 U.S. (13 Otto) 580 (1881)); *Prigg vs. Pennsylvania,* 41 U.S. (16 Pet.) 539 (1842).

An examination of the historical textual antecedents of the Excessive Fines Clause demonstrates that the Clause was intended to curb unrestrained monetary punishments. The Eighth Amendment's prohibition against excessive fines was based on English common and statutory law. Nowhere in American or English common or statutory law is there a basis for repeated monetary punishment for one course of conduct. Text of the Eighth Amendment was "based directly on Art. I, Section 9, of the Virginia Declaration of Rights." *Browning-Ferris,* 492 U.S. at 266 [quoting *Solem vs. Helm,* 463 U.S. 27, 285-286 & n.10 (1983)]. "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same level of protection - including the right to be free from excessive punishments." *Solem vs. Helm,* 463 U.S. at 286.

The notion that the Bill of Rights in general, and the Excessive Fines Clause in particular, were designed to ensure that Americans enjoyed all rights and immunities of their English brothers, renders the English history underlying its adoption valuable, in understanding the protections bestowed by the Excessive Fines Clause. The history of the Excessive Fines Clause may be traced directly back to 1215 and the provisions of the Magna Carta under which substantive limits were placed on the amount of a fine that could be imposed for public wrong. Those substantive limits centered on a proportionality requirement, but also included an underlying guiding principle that the amount of the fme imposed not jeopardize a defendant's livelihood or the defendant's ability to carry on its business.

The historical practice of imposing excessive punishments, which in part motivated the adoption of the English Bill of Rights of 1689 and Magna Carta, dates back many centuries. Prior to the Norman Conquest in 1066, a practice existed in England under which the victim of a wrong, rather than seeking vengeance through retaliation, could instead secure financial compensation from the perpetrator of the offense. This system became mandatory, limiting the right to seek personal revenge to situations in which the injured person had sought and been refused compensation from the wrongdoer. See W. McKechnie, Magna Carta 284-285 (2d ed. 1958). Compensatory sums were imposed as compensation due the victim. At the same time, however, a further payment would be exacted from the wrongdoer as a sum "due to the community", on the ground that every

evil deed inflicts a wrong on society in general, as well as upon its victim. Id. at 285. This theory remains, many centuries later, as the bedrock of punitive damages theory.

This system of settling grievances under Anglo-Saxon law was, at some point after the Norman Conquest, succeeded "by a system, or lack of a system, by which the convicted party was in the King's mercy." J. Jolliffe, The Constitutional History of Medieval England 225 (3d ed. 1954). Under the historical system, the wrongdoer's life, limbs and possessions were put at the King's mercy. The peace was restored by payment of a sum to compensate the victim for his losses (contemporary actual damages) and payment to the Crown as a sum know as an amercement (today's punitive damages). See W. McKechnie, supra, at 286. Payment to the Crown was based on the theory that "offenses against the established order were offenses also against the King." Id. Because a wrongdoer was "at the mercy" of the King who wielded absolute power, in theory there was no limitation on the amount that a wrongdoer could be amerced. In response to the unrestrained imposition of amercements, rules emerged under which the amounts initially amerced were regulated by the gravity of the particular offense involved and were reduced based on the ability of the wrongdoer to pay. The purpose of these rules was to prevent arbitrary and excessively large amercements.

Consistent with the theory that amercements were designed to remedy the wrong done to the public rather than to compensate the person injured, amercements would generally be assessed in a two-stage process. In

the first stage, the maximum possible amercement would be determined by the justices of the court, who had the "duty to see that the amount was proportionate to the gravity of the offense." W. McKechnie, supra, at 288. In some instances, caps on amercements were established by the equivalent of statutes. See J. Holt, Magna Carta 50, 230-231(1965). The second stage of the process of determining the actual amount of the amercement to be imposed in a particular case involved 12 or fewer neighbors who taxed the amercements, "reducing them in accordance with their knowledge of the wrongdoer's ability to pay." W. McKechhie, supra at 288. Thus, while wealth was one of the accepted bases for fixing a fine, see R. Stringham, Magna Carta: Fountainhead of Freedom 13 (1955), it is more accurate to say that lack of wealth functioned in the second stage of the amercements process to allow for the reduction of the maximum potential amercement that had previously been established by courts or statutes.

During the reign of King John, the imposition of amercements became increasingly frequent and unrestrained. Excessive amercements were one of the major concerns leading to the presentation of Magna Carta at Runnymede on June 15, 1215. Three chapters of Magna Carta as accepted by King John on that date were devoted to the problem of excessive amercements. Chapter 20 of Magna Carta provided as follows:

> A freeman shall not amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the

> offense, yet saving always his "contenement"; and a merchant in the same way, saving his "wainage" - if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

Chapter 21 applied these same general principles to earls and barons, while Chapter 22 applied these principles to clergy. The central purpose of these clauses was to remove the arbitrary element in the exaction of amercements.

The method by which amercements were, both before and after Magna Carta, actually imposed illustrates the procedural and substantive content of Chapter 20. The limits of exposure to amercements for any specific wrong were based upon the relative severity of the offense involved, not upon the amount of compensation that might have been due the injured litigant. Chapter 20 also provided that the size of the amercement ultimately imposed might, or perhaps should, be reduced below the maximum potential amercement based upon the wrongdoer's ability or inability to pay. Chapter 20 provided that no amercement could be imposed if to do so would, as in the case of a merchant, result in not "saving his 'merchandise.'" This meant that, in addition to its other safeguards, Chapter 20 "saves to [a merchant] his means of earning a living." W. McKechnie, supra, at 289. Moreover, an amercement, could ultimately bepardoned entirely by the court based on the ability of the amerced to pay.

Over time, the word "fine" took on its more modern meaning and the word "amercement" was no longer generally used. Id. at 293; see also *Browning-Ferris,* 492 U.S. at 289-291 (noting the similar functions of fmes and amercements and the gradual disappearance of nomenclature referring to the latter) (O'Connor, J., dissenting). The use of the word fine carried through and into the English Bill of Rights of 1689, which provided that "excessive Baile (sic) ought not to be required nor excessive Fmes imposed nor cruel and unusual Punishments inflicted." 1 W & M, 2d Sess. Ch 2, 3 Stat. at Large 440, 441(1689). That document was essentially an enactment of the Declaration of Rights of 1689, prepared by a parliamentary convention. Upon accepting the Declaration of Rights, William and Mary had been permitted jointly to ascend to the throne in February, 1689. See L. Schwoerer, The Declaration of Rights, 1689 259 (1981). That instrument, which was "in the tradition of Magna Carta," see G. Smith, A Constitutional and Legal History of England 367 (1955), listed the arbitrary acts of the Stuart Kings that had finally brought on the Glorious Revolution of 1688. These acts included the imposition of "unduly heavy fines." Id. at 368.

The principles of Chapter 20 of Magna Carta were engrafted into Article 10 of the Declaration of Rights of 1689 by a committee of the Parliamentary Convention. The historical material associated with that drafting process establishes that Article 10's express prohibition on excessive fines was intended to apply to fines and amercements, whether imposed in civil or criminal proceedings. L. Schwoerer, supra, 93-94; see also 4 W. Blackstone, Commentaries on the

Laws of England 372 (1768) ("The reasonableness of fines in criminal case has also been usually regulated by the determination of Magna Carta, concerning amercements for misbehavior in matters of civil right.") (footnote omitted).

"It was to the English Bill of Rights of 1689, and Magna Carta [that] the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen. These rights and liberties embodied in Magna Carta, the Bill of Rights and other constitutional documents became vital features of colonial constitutional law." H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," Magna Carta Commemoration Essays 182, 183-184 (H. Malden ed. 1917). The language of the English Bill of Rights of 1689 respecting excessive fines was incorporated in a number of revolutionary declarations. The Virginia Declaration of Rights of 1776, "repeated from prior documents the right against excessive bail and fines . . . (this time using the very language of the English Bill of Rights that was to become the Eighth Amendment)." 1 B. Schwartz, The Bill of Rights: A Documentary History 233 (1971). Essentially the same language from the English Bill of Rights of 1689 was similarly adopted in other colonies. Ultimately, the Excessive Fines Clause of the Eighth Amendment was lifted verbatim from the Virginia Declaration of Rights of 1776 and the English Bill of Rights of 1689.

1. The Monetary Punishments Imposed Against OCF in the Form of Punitive Damages Violate the Excessive Fines Clause Because These Punishments are Disproportionate to Any Wrong Committed by OCF.

The central premise underlying our Excessive Fines Clause was that a defendant could only be fined in accordance with the gravity of the offense. The available historical evidence demonstrates that this requirement of proportionality was designed to interject a limiting substantive restraint on what had come to be under King Johh the unrestrained imposition of monetary punishments. As held in *Solem vs. Helm,* "[w]hen the Framers of the Eighth Amendment adopted the language of the English Bill of Rights," which was a descendent of Magna Carta, "they also adopted the English principle of proportionality." 463 U.S. at 285-286.

A proportionality standard of review is constitutionally required under the Eight Amendment. In determining whether a punitive damage award is proportional, the following objective factors should be considered: the gravity of the offense, a comparison of profits gained from the wrongdoing with the punishment imposed, and a comparison of amount of punitive damages levied with the legislatively prescribed criminal penalties for similar conduct.

a. Further Punitive Damage Awards Agalnst OCF Would be Wholly Disproportionate to the Gravity of OCF's Alleged Wrongdoing.

The punitive damages awarded against OCF bear no rational relation to the gravity of any asbestos-related transgressions allegedly committed by OCF. The gravity of OCF's actions can only be measured in light of what was known regarding the potentially harmful effects of asbestos during the 1950's and 1960's, not in terms of current awareness. The evidence shows that this is not a situation in which OCF can be said to have decided to enrich its coffers by providing and selling a product that it knew would cause great personal injury.

OCF first distributed asbestos-containing Kaylo in 1953, and began to manufacture Kaylo 1958, when it purchased the Kaylo division from Owens-Illinois. OCF voluntarily placed warning labels on Kaylo packages in 1966. (T 1058). The uncertain state of knowledge during this time period concerning the health hazards posed by asbestos is exemplified by the conflicting testimony of the various experts called at trial. OCF stopped manufacturing Kaylo altogether in 1972 when it replaced the product's asbestos component with other materials.

OCF does not now contend before this Court that its commercial involvement with asbestos is factually insufficient as an evidentiary matter to support an award of punitive damages under common law rules traditionally applied in Florida courts. OCF submits, however, that the evidence regarding OCF's wrongful intent, even when viewed in a light most favorable to

APPELLEES, does not rise to a level that might justify, in light of the Excessive Fines Clause, the continued imposition of massive punitive damage awards against OCF. As of June, 1993, judgments have been entered awarding over $57 million dollars in punitive damages against OCF. That figure continues to grow.[13] This amount is grossly disproportionate to the gravity of OCF's transgressions, and grows ever more so with each punitive damage award that is upheld by an appellate court. This Court should overturn the additional punitive damages awarded below as incompatible with the proportionality requirement of the Excessive Fines Clause.

b. The Punishment Imposed Against OCF in the Form of Punitive Damages is Wholly Disproportionate to any Profits Gained by OCF Through its Alleged Course of Wrongful Activity.

The punishment imposed against OCF in the form of punltive damages is also grossly disproportionate to any profit reaped by OCF for its commercial involvement with Kaylo. OCF's total gross Kaylo profit between 1953 and 1972 amounted to approximately $1.48 million. (T 971). Total net sales were only $127 million for those two decades (T 972). A recent review of Kaylo profitability indicates that

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[13] In the two most recent issues of Mealev's Litigation Reports (Asbestos) (February 17, 1995; March 1, 1995), punitive damage awards against OCF were reported around the country during that period in the amount of $14,600,000.00.

profits on Kaylo were significantly lower than those on OCF products generally, and that Kaylo profits were between 1 to 2% of sales, or less than $1.5 million, for the entire two decade period. (T 970-971).

The punitive damages already awarded against OCF exceed the total profits OCF received from its dealings with Kaylo by over $50 million. While it could be argued that punitive damages would have no punitive or deterrent utility unless the damages imposed exceeded the profitability of the marketing misconduct by an appropriate modifier, see D. Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1257, 1319 (1976), here the punitive damages already imposed against OCF for its production and sale of Kaylo exceed Kaylogenerated profits 50 fold. As a matter of law, the enormity of this punishment bears no rational proportion to the gravity of OCF's alleged misdeeds.

c. The Award of Punitive Damages Against OCF Bears No Relationship to Criminal Penalties for Like Conduct in Florida.

Another objective factor available to this Court to gauge the constitutionality of the monetary punishment imposed in the form of punitive damages against OCF is the criminal penalties applicable under Florida law to conduct similar to that allegedly engaged in by OCF here. Cf. *Solem vs. Helm,* 463 U.S. at 291. The jury adjudged OCF liable for punitive damages for its sale and production of asbestos-containing Kaylo. Florida law has long restricted the availability of punitive damages to cases in which private injuries partake of

public wrongs, see *Florida S. Ry. Co. vs. Hirst,* 11 So. 506, 513 (1892), and the Florida Supreme Court has held that "[c]ases in this category may be likened, in general terms, to culpable negligence in criminal proceedings." *Ingram,* 340 So. 2d at 924.

The act of exposing a person to personal injury or inflicting personal injury through acts of culpable negligence, defined as actions showing a reckless disregard for the safety of others has been criminalized in §784.05, Fla. Stat. See *Kimbrough vs. State,* 356 So. 2d 1294 (Fla. 4th DCA 1978). The purpose of the culpable negligence statute is to make criminal those acts which create an unreasonably great risk of harm to others. *State vs. Greene,* 348 So. 2d 3 (Fla. 1977).

The degree of punishment for culpable negligence depends on whether the criminally negligent act results in personal injury. The Florida Legislature has established as a matter of policy that culpable negligence resulting in personal injury is punishable as a misdemeanor of the first degree, with a maximum penalty of $1,000.00 and not more than a one year term of imprisonment. If the injury inflicted by culpably negligent conduct results in death, the offense is categorized as a felony in the second degree, which is punishable by a maximum fine of $10,000.00 and a term of imprisonment not to exceed 15 years. §§782.07, 775.082, 775.083, Fla. Stat.

The Legislature's judginent in setting the penalties for the crime of culpable negligence - which like punitive damages are designed to further the goals of deterrence and punishment - provides a relevant and easily discernible objective standard for assessing the

reasonableness of further awards of punitive damages against OCF. Even adjusting for the fact that OCF, as a corporate entity, could not be sentenced to prison, a punitive award of $8,750,000.00 in this case is completely out of line with the Florida Legislature's current assessment of the level of punishment necessary to exact retribution and achieve deterrence in these circumstances. The disparity between the I-egislature's treatment of analogous, but more severe, criminal offenses, and the punishment imposed against OCF in this case, suggests that the latter does not conform to the Legislature's perception of the appropriate punishment.

2. The Excessive Fines Clause at a Minimum Prohibits Repetitive Monetary Punishments for a Single Course of Tortious Conduct that Threatens Eventually to Deprive a Corporate Defendant Such as OCF of the Ability to Conduct its Business.

Aside from the central rnandate that the imposition of monetary punishment bear some proportion to the gravity of the punishable offense, the Excessive Fines Clause incorporates, and elevates to the level of constitutional prohibition, the historical aversion to fines that threaten a defendant's livelihood. The repeated and unrestrained punishment of OCF for a single course of conduct has produced an aggregate punishment that is not only excessive under any reasonable standard of proportionality, but is also violative of the Excessive Fines Clause because of the

impact of such unremitting punishments pose on OCF over the long term.[14]

Any argument favoring the imposition of further punitive damage awards against OCF must take into

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[14] Florida courts have considered and rejected the theory that punitive damages should be prohibited in mass products liability cases as a matter of Florida law because their repeated unposition threatens to bankrupt corporate defendants. See *Celotex Corp. vs. Pickett,* 459 So. 2d 375, 377 (Fla. 1st DCA 1984), *approved,* 490 So. 2d 35 (Fla. 1986); *Janssens,* 463 So. 2d at 252-253. Neither of those cases disposes of OCF's constitutional challenges to the further imposition of punitive damages against it, however, because neither case involved a challenge under the Excessive Fines Clause of the Eighth Amendment. Both of these cases raise challenges to punitive damages under the well-known principle of Florida law that punitive damages must be assessed according to the ability of the wrongdoer to pay. See *Janssens,* 463 So. 2d at 253, and *Pickett,* 459 So. 2d at 375, both citing *Arab Termite & Pest Control, Inc. vs. Jenkins,* 409 So. 2d 1039 (Fla. 1982). Numerous Florida decisions, including *Arab Termite,* stand for the proposition that the objectives of punitive damages are served by exacting punishment from the defendant which "will hurt, but not bankrupt." *Hoy vs. Poyner,* 305 So. 2d 306, 307 (Fla. 2d DCA 1974); see aslo, *Wackenhut Corp. vs. Canty,* 359 So. 2d 430 (Fla. 1978); *Fisher vs. City of Miami,* 172 So. 2d 455, 457 (Fla. 1965). But the limitations, or lack thereof, placed on the imposition of punitive damages as a matter of Florida law do not resolve the constitutional arguments the Court now has before it. As a matter of fact, Celotex and Johns-Manville have both entered bankruptcy proceedings, due in large part, to excessive punitive damage awards in product liability asbestos cases. See also, S. Berger, Products Liability and Punitive Damages: An Incompatibility, 1 Trial Adv. Q. 49, 55,-56 (March 1982), in which the undersigned predicted corporate bankruptcies resulting from multiple awards of punitive damages for the same course of conduct.

consideration the compensatory damages and litigation costs that OCF has already incurred. While purely compensatory damages may not fall directly within the purview of the Excessive Fines Clause, the amount of compensatory damages imposed against OCF does bear on OCF's ability to survive the imposition of these unrelenting awards. As of the end of 1993, OCF already had resolved (i.e., settled or paid) approximately 120,000 asbestos personal injury claims. (T 984), leaving approximately 98,000 unresolved, and cases were being filed at an increasing pace. (T 943, 984-988). The total cost of all claims, insured and uninsured, through 1999 is estimated at $1.6 **billion**. (T 991). OCF's uninsured costs of this litigation was $74 million between 1990 and 1993; the cost for 1993 was $59 million, and projected uninsured costs for 1994 were $150 million (T 993). OCF shows a reserve on its balance sheet of $892 million for future claims. (T 994).

Unless this Court recognizes in the context of these cases that the Constitution places a meaningful limit on the amount or number of monetary punishments that can be imposed against a defendant for a single course of conduct, OCF will stand assessed with a monetary punishment of well over $50 million for its production and sale of Kaylo. What is more chilling is that if this Court ignores these constitutional limitations, nothing stands in the way of further debilitating punitive damage awards against OCF. Given the fact that scores of asbestos cases involving punitive damage claims are currently pending against OCF in Florida courts alone, the inevitable result of unrelenting punitive damage awards piled on OCF is inescapable.

Absent judicial action, the function of further punitive damages against OCF will be nothing more than punitive overkill, a function neither contemplated by the traditional understanding of the role of punitive damages, nor constitutionally tolerable under the Excessive Fines Clause of the Eighth Amendment.

Article I, §17 of the Florida Constitution also forbids the imposition of excessive fines. While this provision is primarily "directed to legislative enactments providing for or enabling the imposition of . . . punishments," it is applicable whenever "the punishment provided is disproportionate to the offense." *Eger vs. State,* 291 So. 2d 676, 678 (Fla. 3d DCA 1974), *petition dismissed,* 297 So. 2d 28 (Fla. 1974) [citing *Chavigny vs. State,* 112 So. 2d 910,915 (Fla. 2d DCA) *cert. denied,* 114 So. 2d 6 (Fla. 1959) *cert. denied,* 362 U.S. 922 (1960)]. Because the punitive damages imposed against OCF are disproportionate to any offense allegedly committed by OCF, the awards are barred under the Florida Constitution. See *Amos vs. Gunn,* 84 Fla. 285, 364, 94 So. 615, 641(1922). In addition, because a punitive damage award against OCF has been finally upheld by the Florida courts, *W.R. Grace & Co. - Conn. vs. Doughtery,* 636 SO. 2d 746 (Fla. 2d DCA), review denied, 645 So. 2d 454 (Fla. 1994), imposition of any other punitive damage awards is prohibited by the Double Jeopardy Clause under the reasoning of *United States vs. Halper,* 490 U.S. at 446-451.[15]

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[15] See aslo Article I, § 9 of the Florida Constitution.

POINT V. FUNDAMENTAL CONCEPTS OF DUE PROCESS AND FLORIDA LAW FORBID THE IMPOSITION OF FURTHER PUNITIVE DAMAGES AGAINST OCF AS PUNISHMENT FOR OCF'S PRODUCTION AND SALE OF KAYLO OVER 20 YEARS AGO.

Although the Excessive Fines Clause is the constitutional provision explicitly addressed to unreasonable monetary penalties, the Due Process Clause also guards against imposition of excessive punitive damages.[16] As the Supreme Court of the United States recently confirmed, "[a] decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Oberg,* 114 S. Ct. at 2342.

It is a fundamental principle that irrational or arbitrary governmental actions violate due process. See, e.g., *Wolff vs. McDonnell,* 418 U.S. 539, *558* (1974); *Pension Benefit Guar. Corp. vs. R.A. Gray & Co.,* 467 U.S. 717, 729 (1984); *Haslip,* 449 U.S. at 18; *Browning-Ferris,* 492 U.S. at 281 (Brennan, J., concurring). Any judicial toleration of further punitive damages against OCF in the circumstances presented would implicate the judicial system in the imposition of arbitrary punishment in violation of due process.

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[16] Indeed, many of the arguments regarding the applicability of the Excessive Fines Clause to punitive damage awards apply as well to the Due Process Clause.

In *Oberg* and *Haslip*, the Supreme Court emphasized the common law basis of due process constraints on punitive damages. See *Oberg*, 114 S. Ct. at 2355038, 2342 & n. 12; *Haslip*, 499 U.S. at 15-18. At a minimum, such awards must in fact further the underlying purpose for which they were recognized at common law - - to deter and punish the defendant and those similarly situated. *See Halper*, 490 U.S. at 446 n.8. Because, as explained below, no legitimate utility remains in continuing to allow the imposition of staggering monetary punishments against OCF, allowing such awards to stand offends fundamental concepts of due process. At a minimum, the awards of punitive damages below should be subject to a drastic remittitur.[17]

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[17] The Florida Supreme Court recently opined that it would be disinclined to limit the imposition of punitive damages in asbestos (or other mass tort) litigation because such a decision would "place Floridians injured by asbestos on a unequal footing with the citizens of other states" given that the court's decision would not be "binding on other state courts or federal courts." *W.R. Grace & Co. -- Conn. v. Waters*, 638 So. 2d 502 (Fla. 1994). Of course, any decision by this Court limiting the imposition of punitive damages on federal constitutional grounds would constitute authority for other state and federal courts to cite in support of the imposition of similar limitations. Moreover, to the extent that other courts chose not to follow the lead of this Court, the Supreme Court of the United States would presumably act to resolve any conflicting applications of the United Stated Constitution. To date, the Supreme Court has not considered on the merits whether the repetitive imposition of punitive damages for a single course of conduct violates federal due process.

A. Repetitive Punishments Imposed Against OCF for a Single Course of Conduct Serve No Legitimate Deterrent or Punitive Purpose

Specific deterrence provides no justification for the award of punitive damages in this case. Punitive damage claims against OCF in asbestos personal injury cases arise from OCF's sale and/or manufacture of asbestos-containing Kaylo insulation between 1953 and 1972. OCF ceased making, selling, and distributing that product over 20 years ago. Accordingly, additional punitive damage awards are not needed to deter any further misconduct by OCF.[18]

Neither does the award of punitive damages in this cause advance any rational interest Florida may have in punishing OCF's misconduct. As outlined above, OCF has incurred staggering liability for compensatory and punitive damage awards which far exceeds the profit OCF realized from manufacturing and distributing Kaylo. Society's goals of punishment and deterrence are fully satisfied by the compensatory

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[18] See *Hoell vs. Anchor Packing Co.*, slip op., No. 90 CV 0667 (Wis. Cir. Ct. Feb, 16, 1993) [Exhibit 11 to McOmber Affidavit] (denying punitive damages against OCF in part because its product "has not been produced for a period of over twenty years"); see also *Campbell v. Combustion Eng'g*, slip op., No. 92 CV 405 (Colo. Dist. Ct. July 20, 1992) [Exhibit 5 to McOmber Affidavit] ("[T]he deterrent effect of punitive damages has already been accomplished in [the asbestos] content."); *Rimlinger v. Johns-Manville Sales Corp.*, slip op., No. C-6340 (Tenn. Cir. Ct. Jan 22, 1982) (recognizing punitive damages as "inappropriate" in asbestos litigation because "the multitude of pending product liability actions serve as sufficient deterrents and punishment . . .").

damages that OCF has paid, and will pay in future years, to asbestos plaintiffs and well as by punitive damages already awarded against OCF. *Cf. Roginsky vs. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967). Further awards of punitive damages are simply overkill: enough is enough.

Although OCF is a large corporation, the punitive damage awards in these cases are far greater than necessary to punish and deter. OCF has been and will continue to be subject to extraordinary litigation costs as a result of its manufacture of asbestos-containihg products. More than 50 million in punitive damages has been awarded against OCF for the company's involvement with Kaylo.[19] An additional $8.25

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[19] *In addition to the punitive damages awarded against OCF below, punitive damages have been awarded in:* Adams v. Armstrong World Indus., *Nos. 86-C-763, et al. (W. Va. Cir. Ct., Monongalia Country 1990) ($630,000 awarded to 21 plaintiffs, OCF has paid judgment), cert. denied sub nom.*, Owens-Corning Fiberglas Corp. vs. Adams, *113 S. Ct. 3035 (1993);* Barnes v. Armstrong World Indus., *Nos. 86-C-763, et al. (W.Va. Cir. Ct., Monongalia County 1990) $3,750,000 awarded to 15 plaintiffs, OCF has paid judgment), cert. denied sum nom.*, Owens-Corning Fiberglas Corp. v. Adams, *113 S. Ct. 3035 (1993);* Berry v. Celotex Corp., *Nos. 83-L-11989, 85-L-1 1170 (Ill. Cir. Ct., Cook County 1987) ($25,000 awarded to one plaintiff; case was settled);* In re consolidated Asbestos Cases, *No., 92-16334-CA (Fla. 4th DCA 1993) ($5,000,000 awarded to two plaintiffs; OCF is preparing post-trial motions);* Davis v. Celotex Corp., et al., *No. 86-C-763 (W.Va.Cir. Ct., Monongalia County 1989) ($280,000 awarded to two plaintiffs; case was settled);* Dunn v. Owens-Corning Fiberglas Corp., *774 F. Supp 929 (D.I.V. 1991) ($25,000,000 awarded to one plaintiff remitted to $2,000,000), aff'd in part and rev'd in part*

sub nom., Dunn v. Hovic, *1 F.3d 1371 (3d Cir. 1993) (en banc) (award further remitted to $1,000,000), cert. denied, 114 S. Ct. 650 (1993);* Gizzi v. Celotex Corp., et al., *No. C-1-84-961 (S.D. Ohio 1987) ($2,000,000 was awarded to one plaintiff; case was settled); Gravina v. Owens-Corning Fiberglas Corp., No. 90-1815-CIV-RYSKAMP (S.D. Fla. 1991) ($10,000 awarded to two plaintiffs; case was settled);* Jadlowski v. A. C. & Sons, Inc., *No. L0703-9 1 (N.J. Supp. Ct., Middlesex County 1993) ($15,000,000 awarded to one plaintiff remitted to $2,500,000; OCF is preparing an appeal);* Koster v. Owens-Corning Fiberglas Corp., *No. 93-CI-00302 (Ky. Cir. Ct., McCracken County, 1993) ($500,000 awarded to one plaintiff; OCF's post-trial motions are pending); Pickering v. Owens-Fiberglas Corp., Nos. 90- L-1546, et al. (Ill. Cir. Ct., Madison County 1992) ($7,500,000 awarded to four plaintiffs), aff'd, 638 N.E.2d 1127 (Ill. Ct. App. 1994);* In re Guam Asbestos Litig. (Brennan v. Owens-Corning Fiberglas Corp.) *No.CV986-86 (Guam Sup. Ct. 1992) ($4,500,000 awarded to one plaintiff; OCF has appealed);* Reneau v. Green, *Nos. 87-L-870, et al. (Ill. Cir. Ct., Madison County 1990) ($5,000,000 awarded to five plaintiffs; OCF has paid judgment), aff'd sub nom.*, Koch an vs. Owens-Corning Fiberglas Corp., *242 Ill. App. 3d 781, 610 N.E. 683 1993), petition for leave to appeal denied, 152 Ill. 561, 622 N.E. 2d 1208 (Ill. 1993), cert denied, 127 L. Ed 2d 565 (U.S. 1994);* Ripa v. Keene Corp., *No. L-92337-87 (N.J. Sup. Ct., Camden County 1993) ($5,500,000 awarded to one plaintiff; OCF has appealed);* Schiavo v. GAF Corp., *No. L-07636-88 (N.J. Sup. Ct., Camden County 1993) ($100,00 awarded to one plaintiff; OCT has filed post-trial motions);* Schoenian v. Owens-Corning Fiberglas corp., *No. 87-C-775-Br (W. Va. Cir. Ct., Ohio County 1989) $3,900,000 awarded to tltree plaintiffs; case was settled);* Skadan v. Owens-Corning Fiberglas Corp., *Nos. H-94314, H-89278 (N.Y. Supp. Ct., Erie County 1990) ($130,000 awarded to two plaintiffs; case was settled);* Smith v. Owens-Corning Fiberglas Corp., *No. 87-L-293 (Ill. Cir. Ct., McLean County 1993) ($50,000 awarded to one*

million in punitive damages is wholly unnecessary to punish or deter. In these circumstances, it is untenable to suggest that further massive punishment is necessary to deter OCF from making a product that is ceased to produce 20 years ago and will never manufacture again. *Magallanes vs. Superior Court,* 213 Cal. Rptr. 547, 552, review denied, (Cal. July 10, 1985) ("[T]he

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plaintiff; case was settled); Spaur v. Owens-Corning Fiberglas Corp., *No. CLA-028 (Iowa Dist. Ct., Polk County 1992) ($1,500,00 awarded to one plaintiff; OCF has paid judgment); aff'd, 510 N.W. 2d 854 (Iowa 1994);* Watson v. Owens- Corning Fiberglas Corp., *No. 12292-RC (Va. Cir. Ct., City of Newport News 1990) ($100,000 awarded to one plaintiff; case was settled), aff'd, 243 Va. 128, 413 S.E. 2d 630 (1992);* Wheeler v. Owens-Corning Fiberglas Corp., *Nos. 85-44370, et al. (Tex. Cir. Ct., Harris County 1992) ($60,000 awarded to two plaintiffs, OCF has appealed);* Williams v. A.C. & S., Inc. *(Tex. Dist. Ct., Harris County 1993) ($2,000,000 awarded to ten plaintiffs; OCF is preparing an appeal).*

In yet another case, the jury awarded plaintiffs approximately $2.5 million in compensatory damages and also found OCF liable for punitive damages in an amount to be determined during a later phase of trial. *Armstrong vs. Keene Corp.,* No. 88208502 (Md. Cir. Ct., Baltimore City, July 26, 1989). OCF Settled the case before determination of punitive damages, but a substantial portion of the settlement was designed to cover them. See *Owens-Illinois, Inc. v. Armstrong,* 87 Md. App. 699, 591 A.2d 544 (1991), aff'd in part and rev'd in part, 326 Md. 107, 604 A.2d 47, cert. denied, 113 S. Ct. 204 (1992). Most recently, in *Crane vs. Owens-Corning Fiberglas,* Case No. 92-20924-42 (11th Judicial Circuit, Dade County, Florida) the jury awarded $666,000.00 in punitive damages on March 6, 1995. An appeal will be taken to the Third District.

objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace.").

Moreover, although courts may award punitive damages "to deter the commission of similar acts in the future," *St. Regis Paper Co.*, 428 So. 2d at 247, no such additional deterrence is warranted here. Those in the business community and the public at large are well aware of the tens of billions of dollars in indemnity costs that OCF and other asbestos defendants have incurred and will continue to incur. They also know about the asbestos-related bankruptcies of companies representing more than half of the historical liability in asbestos litigation. See, e.g., Oliver & Spencer, "Who Will the Monster Devour Next?" *Forbes*, Feb. 19, 1991, at 75. Punitive damage awards in this context do nothing more than escalate the already bloated transactional costs of a system that has proven to be only marginally effective in securing compensatory damages to persons who have allegedly suffered injury from their contact with asbestos products.

Multiple punishments for a single course of conduct have been recognized by several courts to constitute the very type of unconstrained and excessive punishment that due process prohibits.[20] The rationale driving these decisions mirrors the reasoning of Florida courts in consistently disallowing as an "excessive

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[20] See, e.g. *In re School Asbestos Litig.*, 789 F.2d 996, 1003-05 (3d Cir.), cert. denied, 479 U.S. 852 and 479 U.S. 915 (1986); *Juzwin vs. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1061, (D.N.J.), vacated on other grounds, 718 F. Supp. 1233 (D.N.J. 1989).

penalty" awards of both treble damages and punitive damages for the same act.[21]

The Court's decision in *Oberg* confirms that meaningful judicial review of the excessiveness of a punitive damage award is constitutionally required. 114 S. Ct. at 2341-42. The trial court's review of the punitive damage award here was not meaningful

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[21] See *Trend Setter Villas of Deer Creek vs. Villas on Green, Inc.*, 569 So. 2d 766, 767 (Fla 4th DCA 1990) (finding trial court's award of both treble and punitive damages to constitute "add double recovery and an excessive penalty"); *Cutler vs. Pelletier*, 507 So. 2d 676, 679 (Fla 4th DCA (reversing punitive damages award because the "award of both treble and punitive damages amounts to a double recovery for the appellees, and an excessive penalty to the appellant"), review denied, 518 So. 2nd 1277 (Fla. 1987); *Blll Terry's, Inc. vs. Atlantic Motor Sales, Inc.*, 409 So. 2d 508, 509 (Fla. 1st DCA 1982) ("We agree . . .that an award of both treble damages and punitive damages for the same act amounts to a double recovery or an excessive penalty.") Indeed, five members of the thirteen judge Third Circuit Panel setting en banc in *Dunn vs. Hovic*, 1 F. 3d 1371 (3d Cir.), cert. denied, 114 S. Ct. 650 (1993), declared that additional punitive damages awards against OCF violate due process and/or Virgin Island territorial law because the amounts already awarded in prior litigation have been more than adequate to punish and deter. See id. at 1393-1405 (Weis, J., dissenting, joined by Greenberg, Hutchinson & Scirica, JJ.) (punitive damage awards against OCF violate due process and Virgin Island Law), id. at 1405 (Becker, J., dissenting) (punitive damage awards against OCF violate due process). Although the majority in Dunn declined to strike the punitive damage award in its entirety, the en banc Court approved a remittitur of a $25 million punitive damage award to $1 million on the ground that "the district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation." Id. at 1391.

because in rejecting OCF's motion to strike punitive damages or for directed verdict, the trial court gave no apparent consideration to the effect of successive punitive damage awards against OCF. This Court should hold that no further punitive damages whatsoever should be allowed against OCF as a matter of law, or, at a minimum, should reduce the amount of the award.

B. The Passage of Nearly Two Decades Since OCF's Allegedly Tortious Conduct Extinguishes Any Remaining State Interest in Punishing OCF

It has long been recognized in American jurisprudence that society's interest in punishment and deterrence for a particular wrongdoing fades with the passage of time. For example, in rejecting an argument that a federal two year statute of limitations did not apply to an action to collect a criminal fine, Chief Justice Marshall observed:

> In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This will be utterly repugnant to the genius of our laws. In a country where not even treason can even be prosecuted after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.

Adams vs. Wood, 6 U.S. (2 Cranch) 336, 342 (1805).[22]

Contemporary cases continue to recognize the temporal diminution of society's interest in punishment and deterrence. In *Toussie vs. United States,* 397 U.S. 112, 114-15, (1970), the Supreme Court explained the rationale for statutes of limitation from criminal offenses:

> The purpose of a statute of limitation is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.

See also *United States vs. Scharton,* 285 U.S. 518, 522 (1932) (limitations in criminal actions are to be "liberally interpreted in favor of repose"); *United States vs. Habig,* 390 U.S. 222, 227 (1968). Moreover, the Supreme Court has recognized that the policies behind civil statutes of limitation are in many ways similar to those underlying their criminal

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[22] To similar effect are *M'Cluny vs. Silliman,* 28 U.S. (3 Pet.) 270, 278-70 (1830); *Bell vs. Morrison,* 26 U.S. (1 Pet.) 351, 360; *Wetzell vs. Bussard,* 24 U.S. (11 Wheat.) 309 (1826); *Clementson vs. Williams,* 12 U.S. (8 Cranch) 72 (1814).

counterparts. *United States vs. Marion,* 404 U.S. 307, 322 & n.14 (1971).

Courts and legislatures recognize that societal interest in punishment and deterrence eventually becomes so faded that it is no longer rational to prosecute the accused wrongdoer. In Florida, the statute of limitations for prosecuting personal injuries caused by felony culpable negligence, the closest criminal counterpart to OCF's alleged misconduct here, is three years from the commission of the offense. §775.15, Fla. Stat.[23]

The policy justifications underlying statutes of limitation are particularly pertinent in determining whether a punitive award is appropriate for alleged misconduct of a corporation. As time passes, the management of a corporation is replaced and new individuals and entities become shareholders. Thus, the award of punitive damages many years after an alleged corporate wrong occurred does not punish the corporate officials who were involved in the alleged misconduct or the stockholders who benefited from any profit obtained from the alleged wrongdoing. Rather, such an award penalizes the current management and shareholders, many of whom had no involvement whatsoever with the company at the time of the alleged misconduct. While this court has held that these considerations do not prohibit the imposition of punitive damages in mass marketed products litigation

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[23] Moreover, the evidence adduced at trial establishes that MR. DUDLEY's last possible exposure to Asbestos-containing products occurred more than 23 years ago.

as a matter of law, see *Janssens,* 463 So. 2d at 253, *Janssens* in no way bars a conclusion that the continued imposition of punitive damages against *OCF* offends due process in the circumstances presented.

C. The Punitive Award is Excessive Because OCF Complied With Existing Government and Industry Safety Standards

Punitive damages do not serve a legitimate deterrent or retributive function where, as here, the defendant is being punished for conduct that complied with applicable government and industry safety standards. In this case, OCF presented evidence that various tests conducted in the 1960's uniformly concluded that Kaylo could be manufactured, cut, and used safely without exceeding the threshold limit value of *5* million asbestos particles per cubic foot recommended by the American Conference of Governmental Industrial Hygienists and adopted by most jurisdictions, including Florida, New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located). There was no evidence offered at trial that DUDLEY suffered occupational exposures to asbestos that exceeded the recognized threshold limits at the time. In fact, the undisputed testimony of industrial hygienist Jack Peterson was that workers who were occupationally exposed to asbestos in the 1950's and the 1960's were exposed to concentrations that were less than the threshold limit values accepted at the time. (T 1119). Moreover, it is undisputed that when OSHA promulgated a regulation in 1972 requiring the labeling of asbestos products, the label already being

used on OCF Kaylo fully complied with the regulation.[24]

OCF's compliance with the applicable government and industry standards negates any basis for the imposition of punitive damages in this case, and rendered the punitive award plainly excessive.[25]

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[24] Indeed, according to the excluded testimony of Jerry Helser, as late as the 1970's the federal government actually insisted on specifications in government contracts that could only be met by products containing asbestos. See Exhibit 43, pp. 1627-1630. In addition, OCF was in full compliance with the Walsh Healy Act which adopted the ACGIH TLV's for the 1952- 1970 period. (T 1113).

[25] See, e.g., *Richards vs. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (finding insufficient evidence to support imposition of punitive damages in light of due care shown by defendant's compliance with federal safety standards), cert. denied, 115 S. Ct. 902 (1995); *Drabik vs. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and custom serves to negate conscious disregard and show that the defendant acted with a nonculpable state of mind with no knowledge of a dangerous design defect."); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc) (finlng a $10 million punitive award excessive and remanding for further consideration in light of the fact that defendant's design comported with design of all other members of the industry), appeal on remand, 722 F.2d 1238, 1242 (affirming remittitur of punitive award to $450,000), modified on other grounds, 727 F.2d 350 (5th Cir. 1984); *Sloman vs. Tambrands, Inc.*, 841 F.Supp. 699, 703-04 n.8 (D. Md. 1993) (compliance with federal regulations precludes finding of malice and necessitates entry of summary judgment on claim for punltive damages); *Liesener v. Weslo, Inc.*, 775 F. Supp. 857, 861-62 (D. Md. 1991) ("it is not reckless conduct for manufacturers to follow accepted industry standards, even if counsel has urged a more cautious approach"); *Stone*

Accordingly, the award of punitive damages against OCF below should be overturned or, at a rninimum, substantially remitted.

Man, Inc. v. Green, 435 S.E. 2d 205, 206 (Fla. 1993) (holding that, in general, behavior sufficient to support an award of punitive damages is not shown where defendant complied with applicable governmental regulations).

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that the amended final judgment rendered in favor of DUDLEY and against OCF must be reversed. The trial court committed reversible error in refusing to apply the *Fabre* doctrine and committed prejudicial error in overruling OCF's objection to the use of the Thomas deposition and in refusing to continue the case for one day to allow OCF to present a critical witness. Additionally, the imposition of punitive damages against OCF violated well-established principles found in the United States and Florida constitutions. OCF has been repeatedly punished for the same course of conduct in violation of the Excessive Fines provision of the United States Constitution, the Due Process clause of the United States Constitution and comparable provisions, including the double jeopardy clause, found in the Florida Constitution. The judgment for punitive damages must be reversed in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this day of March, 1995, to John F. Venable, Esquire, 205 South Hoover Boulevard, Suite 403, Tampa, Florida 33609.

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**IN THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA**

OWENS-CORNING FIBERGLAS CORPORATION,

Appellant,

vs.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Appellees.

CASE NO. 94-02059

Lower Tribunal
Case No. 93-9601

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This Reply Brief is submitted on behalf of the Appellant, OWENS-CORNING FIBERGLAS CORPORATION ("OCF") in response to Appellees' brief. The same symbols and introductory remarks contained in the Initial Brief of Appellant shall apply in this brief. All arguments and statements are readopted and realleged. The failure to respond to any particular statements or arguments in Appellees brief should not be deemed a waiver of any of OCF's arguments or acquiescence in those arguments or statements.

Based upon the reasons and authorities contained in the Initial Brief as well as this Reply Brief, Appellant submits that the amended final judgment must be reversed and the cause remanded with directions to grant a new trial on all issues, or alternatively, enter judgment in favor of OCF on the issue of punitive damages, and submit the balance of the case to retrial.

STATEMENT OF CASE AND FACTS

Appellees take no issue with the statement of case and facts contained in the Initial Brief of Appellant. In the argument portion of the brief, however, Appellees do make several statements and arguments relative to OCF's argument that the trial court erred in refusing to continue the trial for one day to allow OCF to present the critical testimony of Mr. Jerry Helser. Contrary to Appellees' attempt to characterize OCF's argument as a mere afterthought, the record shows that OCF not only raised the issue during trial, but the following was argued in OCF's post-trial motion:

> "19. The court committed reversible error in refusing to grant defendant a continuance of one day to allow a witness to be present and in

> refusing to allow the defendant to read the trial testimony of Mr. Jerry Helser given in trials in which this defendant and plaintiffs counsel were involved before this Court within the last several months."

Quite clearly, OCF advised the trial court of its significant scheduling problem during the trial (T 783-784), and post-trial, OCF pointedly requested a new trial because of the failure of the trial court to grant a one-day continuance.

Furthermore, in Appellees' argument, a statement is made that OCF "has over 17,000 employees (R 1092-1160)" and that none of those 17,000 employees were proffered as witnesses by OCF at trial(Answer Brief, p. 32). Whether OCF has 17,000 employees is irrelevant. There was very specific, direct and critical evidence that could have been presented by Mr. Helser had he been allowed to testify. That evidence and testimony is outlined in the Initial Brief. By implication, at least, Appellees seem to believe that any one of the 17,000 employees, perhaps a parking lot attendant, could have been easily substituted for Mr. Helser. Appellees made no such assertion in the trial court, nothing in the record supports that assertion, and it is therefore an inappropriate assertion for Appellees to advance in this Court.

It is also clear from a reading of the transcript that counsel for OCF was seeking relief from the trial court because Mr. Helser was unavailable and "tied up" in trial in Texas. Appellees claim that OCF did not use magic language" in addressing the issue and that semantic hair splitting should be the basis for this Court's decision. Respectfully, this Court need only read the trial court's statement that he "**wanted** to finish the trial" (T 788) by Friday because one juror had already become sick. OCF was faced with a judge who was determined to conclude the case

by Friday notwithstanding the unfairness and prejudice to OCF and a plaintiff gloating at the fact that OCF would be unable to produce a material witness.

On the issue of punitive damages, OCF noted that as of June, 1993, judgments had been entered against OCF awarding over $57,000,000 in punitive damages OCF also noted that the two most recent issues of Mealey's Litigation Reports (Asbestos) reported another S14,600,000 in punitive damage awards against OCF. Although the number may pale by significance, two of the more recent issues of Mealey's Litigation Reports (Asbestos) (April 21, 1995; May 5, 1995) mention another 5766,000 in punitive damage awards against OCF. It is important to note that hardly a week passes without a substantial compensatory or punitive award against OCF in some state or federal jurisdiction.

ARGUMENT

POINT I. WHERE THERE IS EVIDENCE THAT NEGLIGENCE OF NON-PARTIES SUBSTANTIALLY CONTRIBUTED TO A PLAINTIFF'S INJURIES, THE TRIAL COURT ERRS IN REFUSING TO ALLOW THE JURY TO CONSIDER THE NEGLIGENCE OF THE NON-PARTIES AND IN FAILING TO INCLUDE THEM ON THE VERDICT FORM.

OCF relies on its Initial Brief in support of its argument that the trial court erred in refusing to allow apportionment of liability pursuant to § 768.81(3), Fla. Stat. (1989). Space limitations prevent further response.

POINT II. WHERE A WITNESS IS SHOWN TO BE INCOMPETENT, HIS TESTIMONY SHOULD NOT BE ADMITTED; ALTERNATIVELY, EVEN IF A WITNESS IS MARGINALLY COMPETENT TO TESTIFY, *ARGUENDO,* IF THE PREJUDICIAL EFFECT OF HIS TESTIMONY WILL OUTWEIGH THE PROBATIVE VALUE, IT SHOULD BE EXCLUDED FROM JURY CONSIDERATION.

OCF relies on its initial Brief with reference to Point II. Once again, space limitations do not allow full response but OCF continues to believe that the trial court erred in allowing the Thomas deposition to be read to the jury. Either Mr. Thomas was incompetent or the probative value of the deposition was far out weighed by the unfair prejudice or the confusion created by the reading of the obviously confused testimony of Mr. Thomas. A new trial is warranted.

POINT III. THE COURT ERRED IN REFUSING TO CONTINUE THE TRIAL FOR ONE DAY TO ALLOW OCF TO PRESENT CRITICAL TESTIMONY OR, ALTERNATIVELY, IN REFUSING TO ALLOW OCF TO USE A TRANSCRIPT OF THE WITNESS'S TESTIMONY FROM A PRIOR TRIAL.

Appellees' response is basically twofold: (1) OCF never really requested a continuance, and (2) even if a continuance had been requested, it was not error to deny a continuance. Appellees are wrong on both counts.

The trial court made it quite clear that no continuance would be granted (T 788) because one juror had already become sick and the court might risk a mistrial by continuing the case over the weekend. While no "magical" language was used by counsel for OCF, it is quite obvious that counsel was

seeking a short continuance (not an indefinite continuance as asserted by Appellees) because the corporate witness was in trial in Texas. Certainly the denial of a continuance was argued in post-trial motions (R 723-726) and OCF's argument that it was prejudiced by the trial court's failure to grant a continuance is not merely an appellate afterthought.

A number of cases have made it clear that specific objections or motions need not always be made in order to preserve issues for appellate review if a trial court has already announced a decision and further attempts to seek relief would be fruitless. For example in ***Thomas vs. State,*** 419 So.2d 634 (Fla. 1982), an attorney had attempted to object during closing argument but the trial court refused to allow the objection and refused to allow a motion concerning the objection to be made after the jury was excused. The Fifth District held that counsel had waived any objection for purposes of appellate review by failing to state the objection and failing to obtain a ruling from the court. The Supreme Court disagreed and quoted from ***Brown vs. State,*** 206 So.2d 377, 384 (Fla. 1968) to the effect that "[a] lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless."

Likewise, in ***Hicks vs. State,*** 622 So.2d 14 (Fla. 5th DCA 1993) the court held that a party did not waive the right to argue the failure to give a requested jury instruction when the trial court had already "stated his intention not to give the requested charge. . ." Id. at 17. In ***Strong vs. ML Dora Growers Co-Op.,*** 495 So. 2d 1238 (Fla. 5th DCA 1986), the court held that a party did not waive the right to argue a particular point on appeal because the party failed to use the magic words, "I object." Id. at 1240. See also, ***Hunt vs. State,*** 613 So. 2d 893 (Fla. 1993) (Supreme Court could grant relief to defendant for breach of plea bargain agreement despite the absence of formal motion to enforce plea bargain agreement); ***State vs. Heathcoat,*** 442 So. 2d 955 (Fla. 1983)

(once an instruction is requested, and trial court understands nature of instruction, further objection is pointless and unnecessary to preserve issue for appellate review).

The colloquy between OCF and the trial court made it abundantly clear that the trial court had no intention of granting a continuance. No magic language was necessary. The trial court erred in refusing to continue the case over the weekend to allow OCF to present the testimony of its critical corporate witness. The nature of the testimony that would have been given by Mr. Helser is outlined in OCF's Initial Brief. Appellees were well aware of the nature of Helser's testimony, their counsel having repeatedly cross-examined him in other cases. That testimony was not only critical to OCF's ability to show its efforts to replace asbestos fibers in Kaylo (Exhibit 43, pp. 1639, 1642, 1648), but would have also precluded Appellees' argument to the jury that OCF was willing to spend millions of dollars on defense of these cases but did not even bother to send a corporate witness to the trial(T 1216-1218,1282)The extraordinary size of the verdict returned by the jury clearly demonstrates the effectiveness of, and extreme prejudice inherent in, that type of argument.

Appellees make the absurd statement that OCF employs 17,000 people and it surely could have found someone to testy. First of all, Mr. Helser was the listed and anticipated corporate representative. Beyond that, he is the only remaining OCF employee from the time period when OCF was attempting to remove asbestos fibers from Kaylo. (Exhibit 43, p. 1617). The number of employees of OCF is hardly relevant to the issue whether Helser's testimony was critical to OCF's case.

As this Court is aware, and as Appellees acknowledge, OCF is engaged in litigation throughout the county. In any given week, it would be unusual to find that OCF was not defending itself at trial in some state or federal

jurisdiction. OCF has no control over the docketing or scheduling of cases by judges in the various jurisdictions. Consequently, Appellees' suggestion that OCF has the ability to orchestrate where and when its witnesses will be needed is unquestionably incorrect. There is nothing unusual about two trials taking place at the same time in two different states, here, Texas and Florida, and there is nothing unusual about the conflict presented by the instant case. It takes a quantum leap in logic to accept Appellees' statement that OCF was at "fault" because it "made a conscious decision to send Mr. Helser to Texas, and not to Tampa[.]." (Answer Brief, p. 31).[1]

The cases cited by Appellees are inapposite. None deal with mass tort litigation where a single defendant is on trial on the same issues in multiple jurisdictions at the same time. Furthermore, they generally do no more than state the obvious - that a trial court has discretion in granting or denying a continuance. ***Carrera vs. Carrera,*** 641 So.2d 199 (Fla. 4th DCA 1994) recites that the party seeking a continuance. . . was substantially at fault for the difficulties with his counsel." No other facts are recited in the decision, ***Vaides vs. State,*** *626* So. 2d 1316 (Fla. 1993) was an appeal in a first-degree murder, death sentence case. The defendant raised multiple issues on appeal, including allegations regarding his court appointed counsel, disruptive outbursts by the defendant during hearings, alleged threats, complaints

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[1] Of course, had Helser testified in Tampa, it is obvious that OCF would have faced the same problem in, Texas with the same resulting prejudice. Could plaintiff's counsel in Texas have argued that OCF was at "fault" for sending Helser to Florida?

about media coverage, and the like. The defendant refused even to talk to the psychologist retained by defense counsel to testify at the penalty phase of the trial and quite clearly "under these circumstances" in conjunction with the multiple aggravating factors involved in the murder, the Supreme Court refused to find an abuse of discretion when faced with an allegation that the defendant required a continuance in order to compel the attendance of certain family members at the penalty phase. Neither these cases, nor any others cited by Appellees are sufficient to justify the abuse of the trial court's discretion in denying a one day continuance so that OCF's intended corporate witness could present evidence critical to both the issue of liability and punitive damages.

Respectfully, the trial court abused its discretion in denying OCF's request for a one day continuance. OCF was denied a fundamentally fair trial both because the jury was not able to hear critical testimony and because Appellees were then able to convince the jury that OCF cared so little about the trial that it chose not to send a witness to testify. The size of the verdict returned by the jury clearly demonstrates the prejudice.

POINTS IV AND V. THE PUNITIVE DAMAGE AWARD IMPOSED AGAINST OCF VIOLATES THE EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW, FURTHER FUNDAMENTAL CONCEPTS OF DUE PROCESS AND FLORIDA LAW FORBID THE IMPOSITION OF FURTHER PUNITIVE DAMAGES AGAINST OCF AS PUNISHMENT FOR OCF'S PRODUCTION AND SALE OF KAYLO OVER 20 YEARS AGO.[2]

OCF has argued that repetitive awards of substantial punitive damages against it for alleged conduct occurring many years in the past violates the Eighth Amendment of the United States Constitution, the due process clause of the Fourteenth Amendment, and the like provisions of the Florida Constitution. To a large extent, Appellees merely counter that prior cases have not as yet adopted OCF's constitutional arguments and, therefore, there is no occasion to revisit the issues. Such an argument assumes that the law is stagnant.

In ***Browning-Ferris Indus. of Vt., Inc. vs. Kelco Disposal, Inc.***, 492 U.S. 257 (1989) the United States Supreme Court did not reject arguments of the type now

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[2] Space limitations in a reply brief make it impossible for OCF to follow the format of the Initial Brief, including headings and subheadings for Points IV and V addressing OCF's constitutional challenges to the award of punitive damages against it. Consequently, OCF readopts all arguments in these two points. including all subheadings, but will respond to the Answer Brief in a general manner.

being made by OCF, nor is that case dispositive as Appellees assert. Specifically, the Court wrote:

> To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the clause's reach may be, **we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."**

492 U.S. at 263-64. The State of Florida has a "right to receive a share of the [punitive] damages awarded" by virtue of Section 768.73, **Fla. Stat.** and is the recipient of millions of dollars annually in judgments or settlements of awards of punitive damages.[3] Neither ***Browning-Ferris*** nor any of the other cases decided by the United States Supreme Court[4]

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[3] Appellees ridicule OCF's argument that Section 768.73 implicates the Eighth Amendment because the statute places a presumptive but not absolute limitation on punitive damages. The presumptive limitation to a multiple of the compensatory award may be a step in the right direction, but for these purposes the statute is significant because it vitiates a significant part of the ***Browning, Ferris*** rationale for refusing to apply the Eighth Amendment to awards of punitive damages solely between private citizens.

[4] E.g., ***Austin vs. United States,*** 113 S. Ct. 2801(1993) (stating that ***Browning-Ferris*** left open the question of

[Footnote continued on next page]

have addressed the application of the Eighth Amendment in a specific case involving an award of punitive damages partially to a state government. Likewise, none of the Supreme Court cases have addressed this issue in the context of multiple substantial awards of punitive damages, portions of which are payable to the state, in mass tort litigation.[5] At best, the issue remains unsettled.

Interestingly, Appellees also rely heavily on this Court's decision in ***Baione vs. Owens-Illinois, Inc.***, 599 So. 2d 1377 (Fla. 2d DCA 1992). What Appellees conveniently ignore is that this Court felt constrained to allow punitive damages in asbestos litigation because of absence of authority to the contrary. However, two of the three judges concurring in the ***Baione*** decision agreed only "reluctantly" and questioned the "fundamental fairness" of imposing punitive damages on corporations for conduct occurring many years in the past. **Id.** at 1380. Furthermore, as Judges Altenbernd and Hall pointed out in their concurring opinion, the earlier decision in ***Celotex Corp. vs. Pickett,*** 490 So. 2d 35 (1986) (successor corporation liable for punitive damages stemming

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[Footnote continued from previous page]
whether the excessive fines clause applies only to criminal cases: funding that clause applies to ***in rem*** civil forfeitures)

[5] Contrary to Appellees' belief that ***Browning, Ferris*** "did not turn on who ultimately received the money" (Brief, p. 38), the Supreme Court appeared to find that there is a real constitutional distinction between receipt of the money by private citizens as opposed to the state. (". . . nor [does the state] have any right to receive a share of the damages awarded.") 492 U.S. at 263-64.

from conduct of predecessor corporation), included two strong dissents with which a majority of the ***Baione*** court seemed inclined to agree.

Appellees' contention that ***W.R. Grace & Co.-Conn. vs. Waters,*** 638 So. 2d 502 (Fla. 1994) is dispositive of OCF's punitive damages arguments is flatly incorrect. While the ultimate decision in ***Waters*** was a rejection of the discreet arguments made by W.R. Grace, it is important to recognize that no punitive damages had as yet been assessed in that case and the Florida Supreme Court specifically found Grace's reliance on ***Pacific Mutual Life Ins. Co. vs. Haslip,*** 499 U.S. 1(1991), to be premature. Furthermore, the Supreme Court recognized that its decision was not dispositive of any due process arguments by virtue of **its suggestion** that defendants could "build a record for a due process argument based on the cumulative effect of prior awards [.]" 638 So.2d at 506, at the newly established punitive damage phase of litigation. This latter statement by the Supreme Court anticipated future due process challenges and neither rejected them nor gave any indication that Florida courts could not find multiple successive awards of punitive damages for the same course of conduct to violate due process. Finally the court acknowledged the "potential for abuse" in this context but could think of no "fair and effective solution" to protect defendants from abuse. 638 So.2d at 505. The court suggested federal legislation as an alternative so that the problem could be handled on a nationwide basis rather than on a state by state basis.[6]

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[6] Congress is in fact debating tort reform. It seems unlikely that any bill will be adopted and signed by the President within the very near future.

The record now before this Court presents the due process argument that the Supreme Court did not reach in ***Waters***. Not only the record before this Court,, but the published decisions throughout the West Reporter system demonstrate that OCF has been and continues to be assessed multi-millions of dollars in punitive damages for the same course of conduct. The numbers in the instant case are significant and a compilation of numbers from various sources shows perhaps an additional 50 to 70 million dollars in outstanding or paid awards of punitive damages. Even if the Florida Supreme Court felt that a "one bite" or "first comer" theory was inappropriate, OCF has long passed that stage in Florida and throughout the country'.

The long-standing rule in Florida is that punitive damages are intended to punish a wrongdoer and deter others from similar conduct, but without bankrupting a defendant. ***E.g., St. Regis Paper Co. vs. Watson,*** 428 So. 2d 243, 248 (Fla. 1983); ***Sutter vs. Hammond,*** 545 So. 2d 497, 498 (Fla., 4th DCA 1989); ***Hockensmith vs. Waxler,*** 524 So.2d 714,715 (Fla. 2d DCA 1988). One by one, most asbestos distributors and manufacturers have gone into bankruptcy because of multiple awards of both punitive and compensatory' damages. If Florida's public policy not to bankrupt defendants is to be given ant meaning, this Court should determine that fundamental fairness and due process require that a line be drawn to preclude further awards of punitive damages against OCF.[7]

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[7] See, ***Honda Motor Co. vs. Oberg,*** 114 S. Ct. 2331(1994) (constitution imposes due process limits on the size of punitive damage awards).

It remains for this Court to take the initial step to address and to ameliorate the abuses recognized by the *Waters* court and the inherent unfairness recognized by this Court's *Baione* decision. Much of Appellees' argument may be summed up as "it hasn't been done before so it shouldn't be done in the future." The same could have been said in response to the first appellate argument seeking adoption of some form of comparative negligence as opposed to contributory negligence; the same response could have met a challenge to the "separate but equal"[8] doctrine prior to the issuance of *Brown vs. Board of Education,* 347 U.S. 483 (1954); and the same could certainly have been said when the first plaintiff attempted to convince the first court to adopt some type of strict liability theory.[9]

Multiple, substantial awards of punitive damages against OCF for the same course of conduct violate the Eighth and Fourteenth Amendments to the United States Constitution, as well as those provisions of the Florida Constitution discussed in the Initial Brief. This Court, as well as the Florida Supreme Court, have recognized the inherent prejudice and lack of fairness of repeated punishment for

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[8] *Plessy vs. Ferguson,* 163 U.S. 537(1896)

[9] Indeed, the United States Supreme Court confirmed the importance of the constitutional issues raised here by OCF when it granted certiorari in *BMW of North America, Inc, vs. Gore,* 646 So.2d 619 (Ala. 1994), *cert. granted,* 115 S. Ct. 932 (1995). The issues raised by BMW include multiple awards of punitive damages based on the same course of conduct, as well as the excessiveness of the award of damage in that case.

conduct taking place many years in the past. The United States Supreme Court has indicated its concern with these same issues. The record before this Court will now allow this Court to answer the questions left unresolved by ***Browning-Ferris*** and ***Waters***. The Court should reverse the judgment for punitive damages and direct entry of judgment in favor of OCF's favor on that element of damages.

CONCLUSION

Based on the upon reason and authorities herein contained as well as those arguments in the Initial Brief, it is respectfully submitted that Based upon the foregoing reasons and authorities, it is respectfully submitted that the amended final judgment rendered in favor of Appellees and against OCF must be reversed. The trial court committed reversible error in refusing to apply the ***Fabre*** doctrine and committed prejudicial error in overruling OCF's objection to the use of the Thomas deposition and in refusing to continue the case for one day to allow OCF to present a critical witness. Additionally, the imposition of punitive damages against OCF violated well-established principles found in the United States and Florida Constitutions. OCF has been repeatedly punished for the same course of conduct in violation of the Excessive Fines Provision of the United States Constitution, the Due Process Clause of the United States Constitution and comparable provisions, including the double jeopardy clause, found in the Florida Constitution. The judgment for punitive damages must be reversed in its entirety.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 8th day of June, 1995, to **John F. Venable, Esquire,** 205 South21A Hoover Boulevard, Suite 403, Tampa, Florida 33609.

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APPENDIX

"768.73. Punitive damages; limitation

(1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

(c) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s.768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) In any civil action, an award of punitive damages is payable as follows:

(a) Sixty-five percent of the award is payable to the claimant.

(b) If the cause of action was based on personal injury or wrongful death, 35 percent of the award is payable to the Public Medical Assistance Trust Fund; otherwise, 35 percent of the award is payable to the General Revenue Fund.

(3) The clerk of the court shall transmit a copy of the jury verdict to the State Treasurer by certified mail. In the final judgment, the court shall order the percentages of the award, payable as provided in subsection (2).

(4) A settlement agreement entered into between the original parties to the action after a verdict has been returned must provide a proportionate share payable to the fund specified in paragraph (2)(b). For purposes of this subsection, a proportionate share is a 35-percent share of that percentage of the settlement amount which the punitive damages portion of the verdict bore to the total of the compensatory and punitive damages in the verdict.

(5) The Department of Banking and Finance shall collect or cause to be collected all payments due the state under this section. Such payments are made to the Comptroller and deposited in the appropriate fund specified in subsection (2).

(6) If the full amount of punitive damages awarded cannot be collected, the claimant and the other recipient designated pursuant to paragraph (2)(b) are each entitled to a proportional share of the punitive damages collected.

(7) Claimant's attorney's fees, if payable from the judgment, are, to the extent that they are based on the punitive damages, calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein limits the payment of attorney's fees

based upon the award of damages other than punitive damages.

(8) The jury may neither be instructed nor informed as to the provisions of this section.

(2)

Supreme Court, U.S.
FILED
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No. 95-1449

In The

Supreme Court of the United States

October Term, 1995

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

vs.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, Second District of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX

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Appendix B — Exhibits 28a

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Second District Court of Appeal of the State of Florida.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The rulings by the trial court and their affirmance by the appellate court did not involve the resolution of a federal question.

STATEMENT OF THE CASE

I. Misstatements and Omissions of Proceedings in the Trial Court

Contrary to OCF's contention, the trial court did not deny its motion to strike punitive damages. The truth is that OCF never requested that the motion be heard.[1] OCF did not move for a directed verdict on the grounds that an award of punitive damages in this case would violate the Constitution. Rather, OCF's entire motion for directed verdict was simply:

> Your Honor, I would like the record to reflect the motions at this close of the plaintiffs' proof and at the close of all of the proof for a directed verdict on behalf of the defendant.[2]

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1. Obviously, there is no citation to the negative that the motion to strike was not called up for hearing. However, upon the request of the Court, Respondent will furnish the entire record below a review of which will document that at no time was any such motion presented to the trial court for a ruling. Respondent invites OCF to point out any such ruling in its reply to this brief in opposition.

2. (T-1177). Where appropriate respondent will cite to the trial (Cont'd)

OCF neglects to inform this Court that at the jury charge conference, the Dudleys requested that the trial court charge the jury in accordance with Florida's standard jury instruction on punitive damages,[3] and that OCF's response to this request was, "No objection".[4]

The record is absolutely clear that prior to the verdict being rendered in this case, OCF never once presented to the trial court any constitutional challenge to the Dudleys' punitive damage claim.[5] The first time OCF constitutionally challenged the punitive damages sought in this case was after the jury returned its verdict. These arguments were presented in OCF's post-trial motion.

OCF is correct that it sought a remittitur of the punitive award in its post-trial motion. OCF's motion was silent as to what OCF believed was an appropriate remittitur.[6] However, at the hearing on the post-trial motion, OCF specifically requested that the punitive award be remitted to $8.25 million.[7] When the

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(Cont'd)
transcript by indicating (T-). References to the record on appeal not in the form of transcripts will be indicated by (R-). Excerpts from the proceedings which appear in the appendix shall also be designed by (A-).

3. (T-1203).

4. *Id.*

5. Respondent will at the Court's request furnish the entire record so that the truth of this negative can be established. Respondent invites OCF to point out in its reply to this brief any such contention.

6. The post-trial motion is reprinted at pages 5a-13a of the Petition.

7. OCF's counsel stated at the hearing as follows:

(Cont'd)

trial judge ruled on the post-trial motion, he clearly stated that he was remitting the punitive award to the amount requested by Ms. Hill, OCF's lawyer.[8] When the trial court announced its intention to so remit the punitive verdict OCF silently consented.[9]

II. Misstatements or Omissions of the Facts

It is important to remember in this case that Mr. Dudley was first exposed to OCF's Kaylo product in 1972. This is significant because of the events which occurred in that year.

In January, 1972, OCF recognized that OSHA asbestos regulations were to become effective in July, 1972.[10] According to OCF, these regulations would make it much more difficult to

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(Cont'd)

> I think that it is just another point indicating that the punitive damage award must be based on Clarence Dudley's compensatory damages and not on anyone elses, and, Your Honor, that would mean that the cap in this particular case for three times the compensatories to Mr. Dudley would come out to be eight million, two hundred fifty thousand dollars, and it would be that number, although Owens-Corning does not admit that punitive damages should have been awarded in this case, but if they stand *it is our position that they should be reduced to that number.*

(Emphasis supplied) (A-8a).

8. (A-24a-25a).

9. *Id.*

10. (R-1269-70) (A-28a).

sell asbestos containing Kaylo insulation.[11] This was because other manufacturers were producing asbestos free insulation,[12] and customers were beginning to demand an asbestos free product.[13] In response to this problem, OCF directed in 1972 that a major emphasis be placed on the development of asbestos free Kaylo.[14] Interestingly, asbestos free Kaylo was perfected within days of the effective date of the OSHA asbestos regulations.[15]

The development of asbestos free Kaylo in July, 1972, presented OCF with two new questions. First, what was OCF going to do with its stockpile of old asbestos containing Kaylo? OCF decided that rather than destroy its stockpile it would "exert maximum pressure" to sell the old Kaylo.[16]

The second question confronted by OCF was what to do with the asbestos containing dust it had collected in the manufacturing of the old Kaylo. OCF began collecting five tons of Kaylo dust per day back in the late 1950's.[17] It had been adding that asbestos containing dust (*i.e.*, offware) as an ingredient to the old Kaylo.[18] OCF decided in 1972 that rather than waste the

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11. (R-1245) (A-30a).

12. (R-1248) (A-33a).

13. (R-1245) (A-30a).

14. *Id.*

15. (R-1271).

16. (R-1275) (A-34a-35a).

17. (R-1194) (A-37a-38a).

18. (R-1258).

asbestos containing dust, it would include that dust (offware) in the new asbestos free product.[19] By doing this OCF created a new problem, that is, the new asbestos free product was contaminated with asbestos dust from the old product. OCF next faced the question of what it would tell customers about the presence of asbestos in the new product.

On July 25, 1972, a meeting was held at OCF and a plan was developed as to what it should tell customers about the contamination of its new Kaylo.[20] The plan was to refrain from calling the new product asbestos free and instead to designate it as "AF" Kaylo.[21] The plan then called for customers to be told that the new Kaylo did not use asbestos as a reinforcing agent.[22] Despite the fact that OCF knew that claiming the "AF" Kaylo to be asbestos free would mislead workers,[23] they did it anyway. A notice was placed in the cartons which claimed that the product was "asbestos free" and that asbestos was no longer used as a reinforcing agent.[24]

All this was taking place during a time that OCF clearly appreciated the dangers presented by the presence of asbestos in products like Kaylo. In 1972, Dr. Jon Konsen, an OCF employee, wrote a memorandum concerning the health hazards of asbestos and the means of preventing that hazard.[25] Dr. Konsen explained

19. (R-1278) (A-36a).

20. (R-1272, 1278) (A-41a, 36a).

21. (R-1278) (A-36a).

22. (R-1272) (A-41a).

23. (R-1278) (A-36a).

24. (R-1285) (A-42a).

25. (R-1023) (A-43a-44a).

that asbestos dust was known to cause mesothelioma, the type of cancer Mr. Dudley developed.[26] He further explained that respirators (that OCF was recommending that workers wear when using the old Kaylo) were a poor choice for the protection of the workers.[27] According to Dr. Konsen, the inadequate protection afforded by respirators was one of the reasons that asbestos free Kaylo was developed.[28] Apparently, Dr. Konsen was unaware that during 1972, OCF was contaminating the asbestos free Kaylo with the asbestos dust from the old Kaylo, and that it was continuing to sell its stockpile of the old Kaylo with the instruction to wear the ineffective respirator.

These were the events that the evidence showed were taking place at OCF in 1972, when Mr. Dudley was first exposed to their product.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION.

OCF seeks by its Petition to invoke the jurisdiction of this Court embodied in 28 U.S.C. §1257(a). OCF has not and can not discharge its burden to establish that the district court of appeal decided a federal question. The opinion of the district court of appeal was one word, "Affirmed".[29] Since the opinion of the

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26. *Id.*

27. *Id.*

28. *Id.*

29. The Court "would not ordinarily expect an appellate court . . . to remain silent on a constitutional issue requiring decision in the case before it." *Chambers v. Mississippi*, 401 U.S. 284, 303 (1972) (White, J., concurring opinion).

appellate court did not expressly pass upon a federal question, this Court will assume that the decision was due to want of proper presentation in the state court unless OCF can affirmatively show the contrary. *Street v. New York*, 394 U.S. 576 (1969). Here, such a showing can not be made by OCF because there is an independent and adequate state ground for the affirmance by the appellate court.

The state ground which justifies the affirmance of the punitive judgment in this case was that OCF did not preserve for appeal any constitutional challenge to the award of punitive damages.[30] OCF did not move to dismiss the punitive damage claim in the Dudleys' Complaint. OCF did move to strike the claim for punitive damages, but elected for tactical reasons not to have the trial court rule on that motion. In Florida, the failure of a party to secure a ruling on a motion is fatal to any appeal based upon that motion. *Sroczyk v. Fritz*, 220 So.2d 908 (Fla. 1969); *Coffman v. Kelly*, 256 So.2d 79 (Fla. 1st DCA 1972). At no time prior to the trial of this case did OCF request the trial court to in any way limit the Dudleys' punitive damage claim.

At the conclusion of all of the evidence, OCF moved for a directed verdict, but failed to state any grounds for that motion. Because no constitutional argument was made by OCF during the trial court's consideration of the motion for directed verdict, those arguments could not be considered by the trial court in its ruling on that motion or by the appellate court in its review of that ruling. Rule 1.480(a) Florida Rules of Civil Procedure[31]; *Local Mortgage Company of Georgia v. Powell*, 420 So.2d 311 (Fla. 1st DCA 1982); *Wagner v. Nottingham Association*, 464 So.2d 166 (Fla. 3rd DCA 1985), *cert. denied*, 475 So.2d 695 (1985).

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30. The undersigned orally argued to the court of appeal that OCF had not preserved its constitutional challenge to the punitive damage award.

31. Rule 1.480(a) provides that "A motion for a directed verdict shall state the specific grounds therefor."

OCF did not object to the trial court giving the Florida standard jury instruction on the issue of punitive damages. Since OCF did not object, OCF could not assign any error (constitutional or otherwise) in the appellate court to the giving of the punitive damage instruction. Rule 1.470(b) Florida Rules of Civil Procedure;[32] *State v. Anderson*, 639 So.2d 609 (Fla. 1994); *Craig v. State*, 510 So.2d 857 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

The record demonstrates that at no time prior to the return of the verdict in this case did OCF ever raise for the trial court's consideration any constitutional issue concerning punitive damages. This had the tactical advantage for OCF of attempting to obtain a favorable verdict from the jury on the issue of punitive damages which would be virtually unassailable on appeal by the Dudleys. This tactic did not work and the jury returned a substantial punitive damage verdict.

In its post-trial motion, OCF sought to have the trial court determine that it was entitled to a judgment notwithstanding the verdict as to punitive damages or a remittitur of the punitive award.[33] In paragraph 4 of its post-trial motion, OCF requested a judgment notwithstanding the verdict because it contended that the trial court erroneously denied OCF's motion to strike punitive damages. The trial court's denial of this aspect of the post-trial motion did not involve a federal question, but rather, was justified because OCF had elected to not have that motion ruled upon. *Coffman, supra.* Affirmance of this ruling was justified because the trial court was correct in refusing to set aside the verdict based upon an alleged error that it did not commit. *Coffman, supra.*

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32. Rule 1.470(b) provides that "No party may assign as error the giving of any charge unless that party objects thereto at such time. . . ."

33. The post-trial motion is reprinted on pages 5a-13a of the petition.

In paragraph 13 of its post-trial motion, OCF sought an unspecified remittitur of the punitive verdict. At the hearing held on the post-trial motion, OCF clarified that it was seeking a remittitur of the $15 million punitive award to $8.25 million. OCF's counsel could not have been clearer in her request:

> It is our position that they should be reduced to that number [$8.25 million].[34]

When the trial court granted OCF's requested remittitur OCF silently consented. Florida does not permit a party to appeal from a ruling in its favor, *Held v. Held*, 617 So.2d 358 (Fla. 4th DCA 1993), or one rendered with its consent. *Cannon Sand and Rock, Inc. v. Maule Industries, Inc.*, 203 So.2d 636 (Fla. 3rd DCA 1967). Thus, to the extent that OCF requested the appellate court to hold that the trial court was constitutionally required to further remit the verdict, its refusal to do was justified based upon Florida law and did not require consideration of any federal question.

OCF may reply that the remittitur to $8.25 million was based upon Florida Statute § 768.73 and was not a constitutional remittitur. That may be true, however, the important point is that OCF did not in its post-trial motion or the hearing on that motion request a constitutional remittitur below $8.25 million. In short, OCF got the remittitur it asked for and for that reason could not successfully challenge the remittitur under Florida law.

In paragraph 14, of the post-trial motion, OCF claims that it was denied a constitutional right of access to the courts. That issue was never presented to the district court of appeal and thus was not ruled upon by the state's "highest court". As such, this issue can not provide a basis for the jurisdiction of this court.

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34. (A-8a).

In paragraph 15 of its post-trial motion, OCF sought a judgment notwithstanding the verdict concerning the punitive damage award. That paragraph alleged that the imposition of any punitive damages under the facts presented at trial was constitutionally impermissible. The resolution of this issue does not turn on a federal question. In Florida, a party may not seek a judgment notwithstanding the verdict on a ground that was not raised in a motion for directed verdict.[35] *General Dynamics Corp. v. Wright Airlines, Inc.*, 470 So.2d 788 (Fla. 3rd DCA 1985); *Dean Witter Reynolds, Inc. v. Hammock*, 489 So.2d 761 (Fla. 1st DCA 1986). As noted above, OCF did not seek a directed verdict based upon the unconstitutionality of a punitive award under the facts in this case. Thus, affirmance of the trial court's denial of this aspect of the post-trial motion did not require resolution of a federal question, but rather, is easily explainable based upon Florida procedural law.

In paragraph 16, OCF sought a judgment notwithstanding the verdict based upon its claim that any award of punitive damages in this case violated the Eighth Amendment. No such ground was raised by OCF in its motion for directed verdict, and for the same reasons discussed as to paragraph 15, the resolution of this issue in the trial and appellate court did not require consideration of a federal question.

In summary, OCF for tactical reasons decided that it did not wish to present any constitutional argument regarding the appropriateness of the Dudleys' punitive damage claim prior to the jury's verdict. After the verdict was rendered, OCF requested and received a remittitur of the punitive award from $15 million to $8.25 million. Affirmance of the punitive judgment in this

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35. Technically, Florida does not recognize a motion notwithstanding the verdict, rather in Florida the appropriate motion is a motion in accordance with the motion for a directed verdict. Rule 1.480(b) Florida Rules of Civil Procedure.

case was justified solely on the basis of Florida law and did not require the district court of appeal to decide any federal question.[36] For this reason, the jurisdiction of this Court does not exist pursuant to 28 U.S.C. §1257(a).

II.

THERE IS NO JURISPRUDENCE TO SUGGEST THAT THE AWARD OF PUNITIVE DAMAGES IN THIS CASE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Introduction

The Due Process Clause of the Fourteenth Amendment has been held to require that states provide procedural safeguards for the imposition of punitive damages.[37] The Court has suggested that substantive due process provides some limit on the size of punitive damage awards.[38] Florida clearly provides a defendant with procedural due process under a sophisticated statutory procedure requiring trial and appellate review of punitive damage awards.[39] OCF does not challenge the punitive award in

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36. To exercise jurisdiction pursuant to 28 U.S.C. § 1257, the record should at a minimum demonstrate that the federal question was presented in a timely manner under state law. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

37. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

38. *Id.* However, Justices Scalia and Thomas rejected the existence of a substantive due process right that punitive damages be reasonable, *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2726 (Scalia, J., concurring in judgment); Justice Kennedy has stated that the Constitution "does not concern itself with dollar amounts. . . ." 113 S. Ct. 2711, 2724 (Kennedy, J., concurring in judgment).

39. Fla. Stat. § 768.73.

this case on the grounds that it violated procedural due process. Rather, OCF claims that the punitive judgment in this case violates substantive due process. Since the remitted award in this case was upheld by the trial judge and unanimously affirmed on appeal it is entitled to a strong presumption of validity.[40] OCF's petition fails to demonstrate any reason to believe that this presumption has been overcome in this case.

B. The Mere Size of the Award.

In *TXO, supra*, this Court held that a $10 million punitive award did not violate due process. Thus, the mere size of the remitted punitive award in this case does not overcome the presumption of the validity of the award.

C. The Ratio Between Compensatory and Punitive Damages

In this case, the punitive judgment was slightly more than twice that of the compensatory award. This Court held in *TXO* that a punitive award 526 times greater than the compensatory damage award did not violate due process. In *Haslip*, the Court held that a punitive award four times the compensatory award did not violate due process. Moreover, despite the fact that for decades statutory punishments of treble damages have existed,[41] no decision has been found where any court has suggested that punishment of three times the actual damages violates substantive due process. There simply is no jurisprudence to suggest that the ratio between the actual damages and punitive

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40. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

41. For instance, treble damages are permitted in patent infringement cases, 35 U.S.C. § 284; cases involving misrepresentation of Indian produced goods, 25 U.S.C. § 305e; certain consumer credit violations, 15 U.S.C. § 1693f, and anti-trust violations, 15 U.S.C. § 15.

damages in this case overcomes the presumption of the punitive award's validity.

D. Industry Custom

OCF claims that the punitive judgment in this case violated substantive due process because OCF complied with industry custom. OCF fails to direct the Court to any case which suggests that industry custom should be considered in a substantive due process analysis of punitive damages. More importantly, OCF did not comply with industry custom in 1972 when the exposure to its product Kaylo occurred in this case.

In 1972, the industry custom was to sell insulation which did not contain asbestos.[42] OCF violated this custom by continuing to sell asbestos containing insulation (Kaylo) in 1972.[43] In fact, in 1972, OCF continued to sell its stockpile of asbestos containing Kaylo even after it had developed an asbestos free version of the product.[44] The evidence in this case simply fails to support OCF's bald assertion that it complied with industry custom in the 1972 marketing of its product Kaylo. Therefore, contrary to the assertion by OCF, compliance with industry custom does not provide a reason for this Court to review the punitive award in this case.

E. Compliance with the ACGIH TLV

OCF claims that in 1972, it complied with the American Conference of Governmental Industrial Hygienists (ACGIH) threshold limit values (TLV) for asbestos. OCF neglects to tell this Court that the ACGIH clearly advised manufacturers that the

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42. (R-1248).

43. (R-1275).

44. *Id.*

TLV for asbestos was based upon exposure to chrysotile asbestos solely for the prevention of the disease asbestosis.[45] This is important because Kaylo contained predominately amosite asbestos,[46] a much more potent carcinogen for production of mesothelioma than chrysotile asbestos.[47] By 1972, OCF also knew that unlike the disease asbestosis, very low levels of exposure could cause the deadly cancer mesothelioma.[48] The evidence in this case clearly demonstrated that by 1972, OCF knew that the ACGIH recommendation for prevention of asbestosis by chrysotile asbestos was not intended and did not protect workers exposed to asbestos containing Kaylo from developing mesothelioma. Thus, the ACGIH TLV for chrysotile asbestos does not warrant this Court's review of the remitted punitive award in this case.

F. Compliance with Government Regulations

OCF claims that the punitive award in this case warrants review because in 1972, it complied with government regulations in the production and marketing of its Kaylo product. As will be shown below, OCF did not comply with any government regulations in 1972.

1. *OSHA Regulations*

One of the government regulations with which OCF claims it complied was the OSHA asbestos safety standards. In 1972, OSHA required that asbestos products such as Kaylo be accompanied by a warning. Rather than comply with OSHA

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45. (T-1133-4).

46. (R-993).

47. (T-1134-5).

48. (R-990-1).

warning regulations concerning asbestos products, OCF misled workers in 1972 by telling them that the new product did not contain asbestos.[49] Thus, while OCF may have complied with the OSHA warning regulations as to its old Kaylo, it did not do so in 1972 as to its new Kaylo.

Moreover, in 1972, OCF knew that the precautions that it was recommending for its old asbestos containing Kaylo, were unlikely to prevent mesothelioma, the cancer Mr. Dudley developed.[50] Dr. Konsen, OCF's medical consultant told OCF in 1972 that those precautions were inadequate and that asbestos disease could only be effectively prevented by removal of asbestos from the product.[51]

2. *Florida Regulations*

OCF claims that it complied with Florida regulations in the sale and production of Kaylo. The only Florida regulation referred to by OCF is the one that adopted the TLV suggested by the ACGIH. Respondent has already demonstrated why the ACGIH TLV recommendations were not relevant to and not relied upon by OCF in 1972. The same also applies to the adoption of those TLV's by the State of Florida.

There are additional reasons why the Florida regulations do not form a basis for finding that the punitive award in this case violates due process. The Florida regulations were not directed to manufacturers such as OCF. Rather, these regulations were directed to employers who used products such as Kaylo. In 1972, by telling its customers, the employers, that its new Kaylo

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49. (R-1285).

50. (R-1023).

51. *Id.*

no longer contained asbestos as a reinforcing agent, OCF deceived the employers into believing that the new Kaylo was asbestos free. This virtually guaranteed that employers in Florida when using new Kaylo would not comply with the asbestos safety practices prescribed by the Florida regulations. Since the evidence showed that OCF did not comply with any Florida regulations, its claim to the contrary can not provide a basis to find that the punitive award in this case violated due process.

In summary, OCF's alleged compliance with government regulations does not warrant review of the punitive award in this case.

G. Prior Punitive Awards

OCF contends that it has been the subject of $70 million[52] in prior punitive damage verdicts arising out of the same conduct that gave rise to the punitive award in this case. OCF urges the Court to take the prior punitive damage awards into consideration in evaluating whether the punitive judgment in this case violates OCF's right to due process. For several reasons the prior punitive awards against OCF do not render the punitive judgment in this case violative of the Due Process Clause and their existence does not warrant this Court's consideration of this case.

First, OCF has failed to demonstrate that it has ever had a punitive damage verdict rendered against it for the conduct demonstrated in this case. The case at bar presented a very unusual factual situation in asbestos litigation. While the vast

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52. This number has very little meaning because it includes verdicts that were subsequently settled and verdicts on appeal which may be settled or reversed. *See Dunn v. HOVIC*, 1 F.3d 1371 (3rd Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

majority of asbestos cases involve the non-cancerous disease asbestosis, this case involved the malignant disease mesothelioma. Traditionally, punitive awards against OCF have involved persons exposed to Kaylo in the 1950's and/or 1960's. In this case, Mr. Dudley was first exposed to Kaylo in 1972. The conduct of OCF in 1972 was very different from its conduct prior to that time. OCF's conduct during the 1950's and 1960's involved its failure to adequately warn of health hazards associated with its Kaylo product. OCF did not in the 1960's have available asbestos free Kaylo which it contaminated with old Kaylo asbestos dust and it did not in the 1960's deceive the workers into believing Kaylo was asbestos free. Also, in the 1960's, OCF did not elect to maximize its profit by selling a stockpile of asbestos containing Kaylo when it had available an asbestos free Kaylo. Respondent challenges OCF to identify a single instance where the 1972 conduct proven in this case resulted in the payment of punitive damages.

The evidence in this case demonstrates that OCF's conduct in 1972 was much worse than OCF's conduct in the 1950's and 1960's. OCF has never paid a dollar in punitive damages for this conduct. The prior punitive awards against OCF for different conduct are irrelevant to the due process challenge by OCF in this case, and do not provide a reason to review this punitive judgment.

H. The Potential for Future Punitive Awards

OCF argues that since its conduct in 1972 may kill or maim many people who may seek punitive damages, the Court should find that the punitive judgment in this case violates the Due Process Clause. For several reasons this argument does not justify review by this Court.

First, the mere potential for future punitive awards arising

out of OCF's 1972 conduct is speculative at best. OCF's suggestion that the constitutional limitation on the judgment in this case should be determined by asking the rhetorical question: "If every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?", is far too speculative upon which to bottom a constitutional standard. No one can possibly predict how many future plaintiffs there will be who are killed or maimed by OCF's 1972 conduct. Without knowing the number of future plaintiffs killed or injured by OCF's 1972 conduct, the Court can not possibly answer the rhetorical question suggested by OCF.[53]

Another reason that this argument by OCF does not warrant review in this Court is because juries who in the future are asked to evaluate OCF's 1972 conduct can consider the punitive award rendered in this case. Nothing prevents OCF from introducing evidence of prior punitive awards (i.e. this award) in future cases arising out of its 1972 conduct.[54] The lower courts and this Court, if necessary, can then determine if the future awards based upon OCF's 1972 conduct are excessive when considered in light of the award in this case. This approach avoids the gross speculation inherent in OCF's suggestion that this Court attempt to predict the number of future plaintiffs. The mere possibility of some unknown number of future punitive awards for an unknown amount does not warrant review of this case.

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53. The situation here is very different from the one in *BMW of North America v. Gore*, No. 94-896, because in that case the harm had already occurred and the number of potential future plaintiffs could be determined with mathematical certainty. Here, the extent of the harm is unknown, that is, no one knows how many people will ultimately be injured by this conduct.

54. *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984) *cert. denied*, 467 So.2d 999 (1985).

I. The Issues Presented in this Case Are Unlike Those Presented in *BMW.*

OCF argues that this case warrants review because the issues presented here are the same as those presented in *BMW of North America, Inc., v. Gore,* No. 94-896 (argued October 11, 1995). There are no similarities between this case and *BMW* which warrant review of the case at bar.

The misconduct of *BMW* pales in comparison to that of OCF. *BMW* did not disclose that it had repainted a car. OCF unnecessarily and knowingly exposed Mr. Dudley to a powerful carcinogen to avoid wasting asbestos dust that it had collected, and to avoid losing the profit on its stockpile of asbestos containing Kaylo. The injury suffered by Dr. Gore in *BMW* was at most a 10% reduction in the value of his car. Mr. and Mrs. Dudley, on the other hand, have had to slowly watch the progression of Mr. Dudley's terminal cancer caused by OCF's conduct.

The compensatory damages in *BMW* are minuscule compared to those in this case. In *BMW*, the compensatory award was Four Thousand Dollars while in this case, it was $4.26 million. The remitted punitive award in *BMW* is a staggering 500 times the actual damages. While in this case, the remitted punitive damages are only slightly more than twice the actual damages.

As OCF points out, *BMW* adhered to industry custom in not telling Dr. Gore that the car had been repainted. In this case, as shown above, OCF did not adhere to industry custom when it sold asbestos containing Kaylo in 1972.

As OCF points out, *BMW* complied with statutory disclosure standards, while in this case, as shown above, OCF

did not comply with statutory disclosure standards. Rather, OCF deceived workers into believing that its new Kaylo in 1972 did not contain asbestos. This was in direct violation of the statutory disclosure standards required by OSHA.

Another difference between *BMW* and this case is that the potential future plaintiffs could be calculated with mathematical certainty in *BMW*. In this case, no one can determine how many workers will get cancer in the future as a result of OCF's 1972 conduct. Thus, if the appropriate question in *BMW* is as suggested by OCF: "If every other plaintiff recovered the same amount of punitive damages would the resulting punishment be excessive?", that is not appropriate here.

Contrary to OCF's contention, a favorable decision in *BMW* should not have an impact on this case. Whatever due process limits may be placed on punitive damages in *BMW* they would not render the award in this case violative of due process. Therefore, there is no need to grant *certiorari* in this case to await the Court's decision in *BMW*.

J. The Lower State and Federal Courts Are Divided Over the Standards to Be Applied in Reviewing Punitive Damage Awards.

OCF argues that *certiorari* should be granted in this case because state and federal courts continue to apply inconsistent standards in reviewing the size of punitive damage verdicts. The fact that different states take different approaches to the availability and size of punitive damage awards is no reason for this Court to grant certiorari. States have every right to approach the issue of punitive damages differently. What is required of the state courts, and federal courts applying state law, is not uniformity in their approach to punitive damages, but only that the approach they choose is not unconstitutional.

To bolster its inconsistent argument, OCF claims that the decision in this case is directly in conflict with the decision of the Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371 (3rd Cir.), *cert. denied*, 114 S. Ct. 650 (1993). There is no conflict between *Dunn* and this case which warrants review by this Court.

Respondents have already demonstrated that the affirmance of the punitive award in this case had an adequate basis in state law. However, even if one were to assume that the affirmance in this case was based upon the appellate court's rejection of OCF's due process challenge, this case does not conflict with *Dunn*.

In *Dunn*, OCF contended that the punitive award was improper under Virgin Islands' law or federal due process. *Id.* at 1385. The court in *Dunn* **rejected** OCF's due process challenge. *Id.* at 1391. Thus, even if one assumes that the district court in this case rejected OCF's due process challenge that decision is consistent with the Third Circuit's decision in *Dunn*.

OCF also claims that the personal injury suit in *Dunn* arose out of the same course of conduct as the instant case. That is not correct. Unlike *Dunn*, this case was not limited to OCF's reckless indifference in failing to warn customers about the dangers of its product in the 1960's.[55] Rather, the evidence in this case showed that in 1972 OCF unnecessarily contaminated its new asbestos free product with asbestos and "exerted maximum pressure" to sell its stockpile of old asbestos Kaylo.

All that the Third Circuit held in *Dunn* was that under the facts of that case (*i.e.*, conduct of OCF in the 1950's and 1960's) and considering the prior punitive awards against OCF for that same conduct, $1 million was the most OCF could be further punished under the law of the Virgin Islands. *Id.* at 1391. That

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55. *See Dunn* at p. 1374-76.

holding does not conflict with the affirmance of the punitive award in this case applying Florida law to different OCF conduct for which OCF has never been punished. *Dunn* fails to provide any reason for this Court to grant certiorari in this case.

III.

THE PUNITIVE JUDGMENT DOES NOT VIOLATE THE EXCESSIVE FINES CLAUSE

This Court has already resolved the question of whether the Excessive Fines Clause imposes limitations on an award of punitive damages. In *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court confronted the question of whether the Excessive Fines Clause of the Eighth Amendment constrained a civil award of punitive damages between private parties. The Court began its analysis of this question by noting that traditionally the Eighth Amendment was perceived as applying "primarily, and perhaps exclusively" to criminal cases. *Id.* at 262. The Court declined to resolve the broader issue of whether the Excessive Fines Clause could under any circumstances apply in a civil as opposed to a criminal case. *Id.* However, the Court did hold that the Excessive Fines Clause did not constrain a civil award of punitive damages between private parties because the government had not prosecuted the action and did not receive a share of the damages. *Id.* at 264. The decision of this Court in *Browning-Ferris* was grounded upon the historical purpose of the Eighth Amendment. *Id.* In this regard, the Court explained:

> Simply put, the primary focus of the Eight Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages.

Id. at 266. According to the Court, the history of the Excessive Fines Clause demonstrated that it was only intended to constrain "those fines directly imposed by, **and** payable to, the government." (Emphasis supplied). *Id.* at 268. The award of punitive damages in *Browning-Ferris* did not meet either of these criteria and thus did not trigger the application of the Excessive Fines Clause.

OCF now contends in this case that the Excessive Fines Clause does apply solely because Florida is entitled to share in the payment of the punitive damage award. To make this argument, OCF is forced to distort the rationale and holding of *Browning-Ferris.* OCF does this when it states:

> [T]he Court specifically reserved judgment on the issue whether the Excessive Fines Clause limits monetary punishments in the form of punitive damages either "directly imposed by" **or** "payable to" the government. *Id.* at 268.

(OCF petition at p. 13) (Emphasis added). Note what OCF has done: It has changed the quoted language of the Court from the conjunctive "and" to the disjunctive "or". This significant alteration of the Court's opinion is critical to the OCF argument because if, as the Court said, the Excessive Fines Clause only applies to a fine that is "directly imposed by **and** payable, to, the government" then it does not apply in this case. Here, the fine clearly was not "directly [or indirectly] imposed by...the government". Recognizing that the Court's use of the word "and" destroys its argument, OCF simply changes it to "or".

The Court in *Browning-Ferris* explained why the Excessive Fines Clause only applied to a fine directly imposed by the government. As noted above, the Eighth Amendment and the

Excessive Fines Clause in particular is only a constraint on the abuse by the government of its "prosecutorial" power. Where, as here, there is no exercise of the government's prosecutorial power, there is no risk or opportunity that the government will abuse that power. The mere receipt by Florida of a share of the payment of punitive damages obtained in an action prosecuted by a private litigant does not create any risk of an abuse by Florida of its prosecutorial power.

OCF also contends that the Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), supports its argument that this case warrants review by this Court. Again, OCF distorts the holding of *Austin* to fit its contention. In that regard, OCF claims:

> *Austin* stands for the proposition that any monetary punishment imposed by or payable to the government is subject to the limitations of the Excessive Fines Clause.

(OCF petition, p. 15) (emphasis added). Nowhere in *Austin* did the Court make any statement that would support OCF's analysis of that case. Rather, *Austin* required the Court to determine whether a civil forfeiture action brought by the government constituted a "fine" as that term is used in the Eighth Amendment. *Id.* The Court held that it was a fine and that the obvious use of the government's prosecutorial power to extract that fine was constrained by the Excessive Fines Clause. *Id.* at 2803.

The Court's discussion of *Browning-Ferris* in *Austin* underscores that the award of punitive damages in this case is not constrained by the Excessive Fines Clause. In *Austin*, the Court explained the basis of its holding in *Browning-Ferris*:

> The Court concluded that both the Eighth Amendment and §10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent *the government from abusing its power to punish. . . .*

(Emphasis in original). *Austin* at 2804. This statement again emphasized that it was the exercise of the government's prosecutorial power which triggers the application of the Excessive Fines Clause. Conversely, when as here a civil action is prosecuted solely by a private citizen the Excessive Fines Clause is not applicable even if the government shares in the payment.

In summary, the question presented in this case concerning the Excessive Fines Clause was answered by this Court in *Browning-Ferris.* The Excessive Fines Clause does not apply to a civil award of punitive damages between private parties because the Excessive Fines Clause was only intended to restrain the government's prosecutorial power. This is true even if state receives a share of the award, and the only confusion concerning this issue is created by OCF's substitution of the word "or" for the Court's use of the word "and". This attempt to confuse by OCF does not warrant review of the punitive award in this case.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED MAY 16, 1995

IN THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT OF THE STATE OF FLORIDA
HILLSBOROUGH COUNTY
GENERAL CIVIL DIVISION

Case No. 93-9601
Division Z

CLARENCE DUDLEY and & GEORGIANNA DUDLEY,

Plaintiffs,

vs.

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

BEFORE:	HON. THOMAS MILLER Circuit Judge
TAKEN:	Courtroom 2A Hillsborough County Courthouse Tampa, Florida
DATE:	May 16, 1995
TIME:	Commencing 9:00 a.m.

Appendix A

REPORTED BY: Patty A. Starks, RPR
Deputy Official
Court Reporter
Notary Public

APPEARANCES:

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Appendix A

* * *

[9] MS. HOPPE: Your Honor, can I ask you to conform these copies for me?

THE COURT: Yes.

MS. HOPPE: Thank you.

(Pause)

THE COURT: You have the original, right?

MS. HOPPE: Yes. Thank you very much, Your Honor.

THE COURT: Okay. What is next on the agenda?

MS. VENABLE: Your Honor, we have a motion to tax costs in the Dudley case, and I do not believe that Ms. Hill has any objections to the taxable costs listed in our motion.

MS. HILL: Your Honor, that is correct.

THE COURT: Grant the motion.

MS. VENABLE: Thank you, Your Honor.

MR. VENABLE: Your Honor, next I believe is a motion for new trial in the Dudley — by Owens-Corning in the Dudley case.

THE COURT: Okay. It is the defendant's motion, right?

MS. HILL: Yes Your Honor.

[10] Katharine Hill on behalf of Owens-Corning. Your Honor, we have submitted to the Court a written motion for judgment notwithstanding the verdict or in the alternative for a new trial or in the alternative to all of those for remittitur of the award of damages.

Your Honor, I will not go through every point that is in the written motion. We would stand which by the written motion and any arguments which have been made previously to it.

The main points, though, that I might point out to the Court, first of all, of course, involves the Fabre instruction. It is the position of Owens-Corning that sufficient evidence was, in fact, presented in Mr. Dudley's case to have allowed at least his employer if not several of the other manufacturers onto the verdict form, and we believe it was error not to do so and would ask for a new trial in that regard.

The second point that I would like to bring out would be the position of Owens-Corning that reversable error was committed when a refusal of a one-day continuance was made which would have allowed [11] Owens-Corning to bring in Jerry Helzer to testify before the Court.

Mr. Helzer is an important witness for Owens-Corning because he is the only live witness who can now come and explain to a jury and testify as to certain facts, and Mr. Helzer, in fact, was present and knows these facts from his personal knowledge. Without his testimony we feel that this jury did not see a full picture of the situation, and I think that that is borne out in the excessiveness of the award of damages that was made. Mr. Helzer would have been available if we had had the continuance.

Appendix A

We also were not allowed to read testimony from previous trials that, although, Mr. Dudley was admittedly not a party to, Mr. Venable had had the opportunity to cross examine Mr. Helzer. Mr. Helzer's testimony is not case specific to the point wherefore each of any different plaintiff he is going to have something different to say or something to add. In fact, his testimony remains constant from trial to trial and, therefore, we do not believe that it would have been improper to [12] allow the reading of his prior trial testimony in lieu of his appearance in person.

Your Honor, the last point of the three that I will make oral argument on involves the issue of damages. Our first point is that Owens-Corning continues to stand by its position that punitive damages should not have been allowed to be presented to the jury. We would stand by all arguments made in our motion to strike which was filed in this case and which I have incorporated into a memorandum of law which I have supplied to counsel and filed on the idea of remittitur of punitive damages.

We believe that the jury's verdict here, Your Honor, was based on not on the facts of this case but, in fact, on sympathy and prejudice to Owens-Corning by the fact that Mr. Helzer was not allowed to testify.

Furthermore, Your Honor, the award of punitive damages is clearly excessive pursuant to Florida law. Section 768.73 states that the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times the amount of compensatory [13] damages. When the punitive damages exceed that number, the award is presumed to be excessive, and the defendant shall be entitled to a remittitur unless there was a showing of clear and convincing evidence that the award was not excessive.

Appendix A

Your Honor, I would maintain that in this case there is no evidence that is clear and convincing which would have allowed this jury to reach this number and which should negate any opportunity for remittitur in favor of the defendants.

The evidence that was presented I do not believe that there was anything any different than the evidence that has come in in cases before and before previous jurors which have ended up with no award of punitive damages. I do not believe that there was any basis for taking this award out of or placing it within the exception of the statute.

The question then becomes: What would three times the compensatory damages be? I have been provided with a draft of a judgment which would include the compensatory damages of both Mr. Dudley and his wife.

[14] It is OCF's position that Mrs. Dudley's compensatory damages cannot be included as part of the multiplier. Mrs. Dudley's action is derivative, in nature. It does not stand without her husband's action. Punitive damages cannot be awarded in the general case without an award of compensatory damages. I believe that the derivative nature of Mrs. Dudley's claim removes her from the possibility of receiving punitive damages.

In the memorandum I filed I cited two cases to that general proposition. I admit to the Court that both of these cases are pre the Tort Reform Act. I did not find a case which addressed this issue specifically now that we have a cap on punitive damages. Nonetheless, Your Honor, I believe that these cases do stand for the proposition that a derivative claim or a consortium claim should not receive punitive damages.

Appendix A

The first case that I would cite would be Moran vs. Stephens, 265 So.2nd 379. It is a 1972 Fourth DCA case. In that case, Your Honor, both husband and wife, the wife was actually the person that had received the [15] injuries, were awarded punitive damages, the husband in his derivative claim. The Court reversed the award of the punitive damages to the husband. I am sorry, Your Honor. I want to check and make sure that I did not mislead you on any points.

I believe in this case the Court simply reversed and said that it was impermissible to award punitive damages to the husband in this case. Martin vs. Story relied on Moran vs. Stephens. Martin vs. Story was a slightly different type of a case in the fact that in that case —

THE COURT: What is the cite on it?

MS. HILL: Your Honor, 97 So.2d 343. It is a 1957 Second DCA case.

THE COURT: Now wait a minute. It could not rely on Morgan —

MS. HILL: The Moran vs. Stephens relied on this particular case.

THE COURT: Oh, okay.

MS. HILL: In this case, Your Honor, punitive damages were awarded again to both husband and wife. There was a loss of consortium claim. The husband not [16] specifically requested punitive damages in his claim — in his prayer for relief. Because of the way that the jury instructions were

presented to the jury, the Court felt that the — the appellate court felt that the jury had been misled to the understanding that they could award punitive damages to both parties and, again, the court reversed on the award of the punitive damages to the husband.

Your Honor, I do not recall — I thought that I had with me the jury instructions on punitive damages. Mrs. Venable I know is very familiar with them. That jury instruction is, in fact, specific to the person. It seemed to be in my memory that it stated something to the effect that if you find in favor of Clarence Dudley you may consider the question of punitive damages.

If that is the case, Your Honor, I think that it is just another point indicating that the punitive damage award must be based on Clarence Dudley's compensatory damages and not on anyone else's and, therefore, Your Honor, that would mean that the cap in this particular case for three times the [17] compensatories to Mr. Dudley would come out to be eight million, two hundred fifty thousand dollars, and it would be that number, although Owens-Corning does not admit that punitive damages should have been awarded in this case, but if they stand it is our position that they should be reduced to that number.

THE COURT: You may respond.

MR. VENABLE: Thank you, Your Honor. First, I know that the Court has heard in some detail a lot of the evidence that the plaintiffs have put on in this and some other trials, and there was some evidence in this case that was somewhat unlike or in addition to evidence that had been introduced into previous trials against Owens-Corning, but I think that it is important especially as we address the punitive damages question to keep in mind the willful, wanton, and egregious activities of this company

because they, in fact — that activity will be one of the things that the Court must consider in the remittitur aspect of the punitive damages.

The evidence clearly showed, in fact, without I think any dispute, Your Honor, that [18] this company became aware in the early forties that its product was a dangerous product and it was a toxic product, was advised in 1956 that the asbestos by their own medical consultant could cause cancer and advertised the product in 1956 and thereafter as being non-toxic, pleasant handling and well liked workers' material.

In 1962, Your Honor, they had the opportunity to remove the amocite asbestos which they knew to be the more dangerous type of asbestos from the product which comprised at that time of approximately eighty percent of all of the asbestos in the product. This could have removed the asbestos — that eighty percent of the asbestos from the product and they did a cost analysis on it, and it cost less than a penny per pound to do that, and they elected not to do that.

In 1964 they knew that other companies had began to place warnings on their products, and yet this company despite repeatedly, despite repeatedly considering whether they should warn never once in any document that is introduced into this trial considered the [19] impact of warning or not warning on the health of workers.

They knew at the time that their product was being used by thousands and thousands of people and that they were at risk for developing terminal illness and dying, and yet repeatedly through the mid-sixties this company simply asked the question of whether or not "we ought to put a warning to protect ourselves

from lawsuits" and, in fact, Your Honor, it was on December 23rd of '66, the first day that they got sued, they put a warning on it.

In the latter part of the sixties, Your Honor, they had the opportunity to sell — in fact, in 1963 forward they had the opportunity to sell a high temperature product that contained no asbestos which they said in their own documents that evidence in this case could not be as dangerous to the workers as Kaylo was. They made profit but not a sufficient amount of profit to satisfy them on the product and, therefore, they did not sell that product and thereby knew that they were endangering thousands upon thousands of [20] workers.

In 1972, Your Honor, this case — the evidence in this case shows that even after they came to the conclusion and found a way to eliminate all asbestos from the product, to take every bit of asbestos out of the product that they had some dust that they had collected — they had dust collectors in the past, and when they would sav the old Kaylo that contained asbestos, they would collect the dust, and they would collect up to five tons of that dust a day.

Even after they got to the point that they could have removed all asbestos from the product, they refused to do so because they wanted to use up the dust that they had collected from the old Kaylo, and they went about telling the purchasers of the product that they had created a product which no longer contained asbestos as a reinforcing agent full well intending to disseminate to those workers the fact that this product was now asbestos free when they knew and had written memorandums that in this case that that product, in fact, still contained [21] asbestos because they refused to give up the dust.

Appendix A

They continued to go ahead and expose workers and endanger them long after they knew about mesothelioma and long after they knew about the fact that very small exposure to the asbestos could cause cancer and death. It is against that back drop, Your Honor, that we address the punitive damage question.

Now, this is a case which is as serious from the standpoint of what the conduct of the defendant can do as there can be, that is known to mankind. Their conduct places at risk thousands of human beings' lives and in fact has resulted in terminal illness in many, many people including the plaintiff in this case.

Statute 768.73 on punitive damages does not place a cap of three times on the amount of punitive damages. What it does is that it gives to the Court some guidance as a presumption of what would be excessive, and it simply provides that the Court can presume that three times is excessive until and unless the facts of the case show otherwise.

[22] Now, punitive damages are something that the Florida courts have long recognized is dependent upon many factors, and in fact this statute does not change one bit of that. It does not address one thing about altering those factors that are important to consider in determining whether or not an award of punitive damages is proper or excessive.

As the Florida Supreme Court noted in Wackenhut vs. Canty at 359 So.2d 430 in 1978, admittedly before this statute, Your Honor, but this statute alters nothing about the things that the Court must consider in determining whether or not there has been evidence that the award is excessive.

It says, "Punitive damages are particularly left to the

discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage found by the jury from the evidence.

"Since the degree of punishment to be inflicted upon the defendant is particularly [23] within the province of the jury, courts hold punitive damages excessive only under unusual circumstances."

Again, Your Honor, the Florida Supreme Court, Your Honor, in 1982 in Arab Termite and Pest Control vs. Jenkins at 409 So.2d 1039, again, addressed this concept of punitive damages.

"When claims for punitive damages are made, the respective provinces of the Court and jury are well defined. The Court is to decide at the close of evidence whether there is a legal basis for recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff. Once the Court permits the issue of punitive damages to go to the jury, the jury has the discretion whether or not to award punitive damages and the amount which should awarded. Punitive damages are particularly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage [24] found by the jury from the evidence."

Your Honor, I think that the following case out of the Fourth District, American Medical International, Inc., vs. Sheller, M.D., reported at 590 So.2d 947 —

THE COURT: 947?

MR. VENABLE: Yes, sir, 947. That is particularly instructive because the Court will recall, and I have case the here, but the Court is certainly more than well aware of the proposition that the amount of punishment must be in relation or the jury should consider the wealth of the defendant in determining the amount of punishment, and the cases are replete with comments to the effect that what would be punishment to a poor person or a person of limited means would be no punishment at all to a person of substantial means.

So, in 1992, Your Honor, the Fourth District was confronted with the case wherein there had been one hundred thousand dollars in compensatory damages awarded and nineteen million dollars in punitive damages had been awarded. The Court looked at that, and one of the things that they looked at was whether [25] or not this amount of damages, nineteen million dollars in punitive damages, was excessive.

One of the things that they looked at, of course, was the net worth of the defendant. They found in that case that the net worth of the defendant was one billion dollars and concluded that in that situation where you had a company that had a net worth of one billion dollars, that nineteen million dollars would not be excessive. In fact, they upheld that verdict.

Your Honor, in this case we have a tremendous — an enormous wrong that jeopardized tens of thousands of people on one hand. We have a defendant with a net worth of two billion dollars on the other hand.

The argument is made that the jury somehow because of passion, prejudice, or considering things outside of the evidence awarded an amount of punitive damages that was excessive; that

simply flies in the face of the clear and convincing evidence in the case because, Your Honor, the jury awarded in this case punitive damages less than, less than one [26] percent of the net worth of the company. A jury that was being motivated by passion or prejudice or some outside force certainly would have awarded, Judge, more than one percent against — of the net worth of the company.

This is a jury who, in fact, awarded less punitive damages than were asked for, awarded punitive damages that were less than one percent of the net worth of the company, and, therefore, Your Honor, I would submit that the evidence is clear and convincing that in this situation this award of punitive damages, admittedly a large amount of punitive damages but that this amount of punitive damages would not be excessive as a way to deter and punish this company which will clearly not bankrupt this company nor has any argument been made that they're unable to pay, but it would take an award of punitive damages of at least this amount of money to in anyway get the attention of this company and to have it respond as it should respond.

So, Your Honor, under all of the case law, the statute provides no safe harbor for [27] this defendant because the clear and convincing evidence that was produced in this courtroom shows an enormous wrong with a company with tremendous assets where we had nineteen million dollars being upheld with a company worth one billion and fifteen million dollars award with a company that has two billion. Clearly that must be taken into consideration in determining whether or not this is excessive.

The statute does not provide a cap. It simply provides for guidance for the Court and then the Court is to consider the same

type of evidence that it always considered in determining whether or not the award was excessive.

As to the other issues, Your Honor, the Fabre issue as to the employer, there was no evidence as to who Mr. Dudley's employer was, what specifically Mr. Dudley's employer did wrong, and importantly that there was no evidence, Judge, that anything that Mr. Dudley's employer did that was quote — if it was found to be, quote, negligent, there was no evidence that that negligence was a [28] legal cause of the injury to Mr. Dudley.

As we've gone over and over again, they've got to have all of the same requirements met that a plaintiff would have and clearly that was not met as to anyone including the employer.

As to the manufacturers, they violated the Dougherty case law which was decided by the Second District — I do not think that I have a copy of that with me. It was decided by the Second District.

Owens-Corning Fiberglas was a defendant in that case in fact, and the courts clearly held that if you are going to have a manufacturer appear on the verdict form that is not a party to the action, then you have to at least demonstrate that the amount of asbestos in the product, the type of asbestos in the product, none of which was done in this case as to any product that was being used in Mr. Dudley's vicinity other than Kaylo. They knew of the requirements and yet, nevertheless, they found — they chose not to put that evidence in, Your Honor, and they asked to have the manufacturers on the verdict [29] form and that's at 19 Florida Law Weekly D195.

THE COURT: I have a copy of that.

MR. VENABLE: It is as clear as a bell.

THE COURT: I have a copy of that.

MR. VENABLE: Thank you, Your Honor. They simply refused to comply with the requirements of that.

Finally, Your Honor, as to the continuance, I must admit that I am working from recollection because I do not have the transcript of that particular day yet, but I have no recollection of the attorney for Owens-Corning ever moving — moving to Your Honor that the case be recessed and continued on Monday.

I do have a recollection of counsel for Owens-Corning approaching the bench and saying, "Your Honor, I think we have a problem. We may want to call another witness on Monday."

Your Honor at that time I think explained to counsel for Owens-Corning that it was not your desire to recess the case in the middle of Friday because one juror had already [30] gotten sick, and we had been left in a situation where Owens-Corning refused to stipulate to less than six jurors deliberating, but I never recall a motion being made to Your Honor to, in fact, recess this trial and to reconvene it on Monday nor did Your Honor ever preclude counsel for Owens-Corning of completing the day on Friday and having the case starting — you know, starting back again on Monday; that was never done.

And clearly, Your Honor, the Court has the authority and the control of its own trial calendar and events which transpire in its trial.

This was a witness who was an employee of Owens-Corning

Fiberglas. They control where he goes and when he goes there. They made the argument that he is essential, he is the only witness that can come and talk about these facts. This is a company that is in tens of thousands of cases. By the evidence in this trial by Mr. Pierce, this is a company that has been sued tens of thousands of times.

Now, they have one corporate witness, [31] Your Honor, that they claim knows about the facts of these cases. Assuming that that is true, although, there is no evidence to that effect in this trial, but assuming that that is true, they're in courtrooms in fifty states, thousands of courtrooms, trials starting every other week, every week. There is a trial in Florida virtually every two or three weeks just in Florida, and they're in thousands of cases.

This company elects not to depose this witness so that they can have the deposition utilized in this case. They elect not to do that. They are told by a letter that I wrote to them a week before the trial that I will complete the plaintiff's case on Thursday morning and they will be — you know, be ready to go. I put that letter, in fact, in the court file during the trial.

So, they were told a week ahead of time precisely when they were going to get this case, and they have absolute control over this witness. They elect to send the witness, according to counsel, which I assume is true, they elect to send this witness to Texas on [32] the same day that they know that they need this witness in this courtroom.

Now, I understand that he cannot be in Texas, and he cannot be in Florida and Minnesota, and he cannot be in New Jersey, and he cannot be in Hawaii on the same day, but they knew it too, and they knew it a year ago, two years ago.

If his testimony is that essentially, then they take the deposition in the Dudley case and there is no objection that I can possibly have to reading that deposition to the jury. They chose not to do that knowing full well that they would be in conflict in numerous courts. They cannot help but be in conflict, and then to suggest that Your Honor is supposed to suspend the trial, risking mistrial by jurors' absence with a company that will not stipulate to using less than six jurors, that that is reversable error, Your Honor, there may have been an error made but it was an error in judgment of Owens-Corning not to be prepared to present their case when they knew a week ahead of time precisely when it was going to start. They knew that they [33] only had one other witness, and so they knew that they were going to run out of time to present testimony.

But more importantly, Your Honor, from a technical standpoint, I do not think that they ever asked the Court to do it. They simply talked about the possibility of doing it. Thank you, Your Honor.

I would ask for all of the reasons that have been argued at the trial as to all of the other matters that the motion for remittitur, new trial, and judgment notwithstanding the verdict be denied.

MS. HILL: Your Honor if I may briefly respond. With regard to Mr. Helzer I would like to clear up a misconception. Mr. Helzer, in fact, was in Texas before Thursday, was supposed to go on, could not get on. They were late in the trial, and they could not pull him out because he was waiting for the call to go on and that's why Thursday became a major problem in trying to get him here.

I was not present, and so I cannot say with certainly whether an actual motion was made or whether representation was made

to the [34] Court of the problem with Mr. Helzer and the fact that we could not have him here during that first week of trial, but all in all the concept was that he could have appeared on Monday. He could have testified and quite frankly, Your Honor, I think that if Mr. Helzer had been here to testify, that we may not be having the argument that we're having on the punitive damages at this point.

In regards to the punitive damages, some of the numbers and some of the information that I believe is presented and was presented to this jury would, in fact, mean that Owens-Corning has a negative net worth at this point in time. So, if we want to look at what their worth is and what an award of punitive damages should be, that number should be zero.

Furthermore, Your Honor, Mr. Venable has made a very nice argument, but he again reiterates the statement of let's make them sit up and take notice so that they can change their ways. Your Honor, this happened twenty years ago. Sitting up and taking notice, sure, this kind of money anyone sits up and takes notice of, but there is not something [35] that OCF can do. It is going beyond punishment. It is going much further than that to enter an excessive amount such as was awarded by this jury.

Furthermore, Your Honor, I take exception and I do believe that the legislature meant to put a cap on punitive damages unless there were extraordinary circumstances with clear and convincing evidence shown that a jury's award in excess of three times the compensatory damages was, in fact, a proper amount.

I do not believe that that evidence was here. I do not believe that this jury could have given this amount in punitive damages unless they were, in fact, operating from prejudice, bias, and sympathy for the plaintiff in this case. I do not believe that the

evidence is such that this — that that number can stand, and I would again state that the punitive damages at the least should be reduced to the amount that we have requested.

MR. VENABLE: Your Honor, just —

THE COURT: What about their other motion? Is it still on the docket, motion for [36] reduction of judgment based on setoff and collateral sources?

MS. HILL: Your Honor, that — we filed that formally in an abundance of caution to make sure that we had done that properly. The judgment which Mrs. Venable has provided to me, in fact, has those reductions contained within them.

On that, the only concern that I have is there are no collateral sources. I know there was testimony that went to the VA. I guess that the VA does not pay. It is not as though it is payment I had made to him. He goes in and has the procedures done. Assuming that that is correct, there would not be a collateral source reduced, although, the prior settlements have been used to reduce it.

MS. VENABLE: And, Your Honor, preparing the final judgment I assume that the Court would grant the motion for setoff and set off the amounts of prior settlements.

THE COURT: Okay. We'll go back then to this motion notwithstanding verdict.

MR. VENABLE: Yes, Your Honor. The only thing that I wanted to add is that the [37] argument — first of all, the argument that this statute places a cap on damages, it just does not do it. I mean, it is as clear as a bell.

Appendix A

It says there is a presumption and then the Court must consider the evidence and determine whether there is a reason — whether the damages are excessive — let me start over again. There is a presumption that three times the compensatory would be excessive; however, the statute specifically instructs the trial court to consider whether there is clear and convincing evidence that it is not excessive .

If we were to accept the proposition this is a cap, Your Honor, if Owens-Corning Fiberglas — let's take — I think that there was something with Metropolitan Life not long ago where they were out selling insurance policies and they were defrauding customers and let's say that it was a thousand dollars a person that they defrauded. Would the Court be virtually confined to a punitive damages award of three thousand dollars against Metropolitan Life Insurance Company, anything [38] above three thousand dollars would be excessive for fraudulent sale of insurance policies? I do not think that that's what the legislature meant and that's not what they said.

They made it clear for Your Honor and trial courts that they are to, in fact, look at the evidence and see if, in fact, there is reason to find that this was not excessive by clear and convincing evidence, and here it is clear because, Your Honor, this punitive award is less than one percent of the net worth of this company, and there was no evidence, Your Honor, not one shred of evidence introduced in this trial.

I feel for Ms. Hill somewhat. I have a great deal of respect for her. She was not here I do not think by her own choice, but Owens-Corning Fiberglas chose to have someone from out of state try this case, and unfortunately they do not choose to send the same lawyer back to this courtroom to discuss the facts.

But, in fact, they brought Mr. Pierce who was never asked a single question by [39] Owens-Corning about their net worth. I am the one that asked it. He never said that they had a net worth, never said that they had a net worth. In fact, he agreed with me that many people would perform the net worth calculation to be two billion dollars. But Ms. Hill unfortunately was not here for that not by her own fault.

The argument is also made, Your Honor, that these people are not the same people anymore and so they do not need to be punished. Well, that argument was made at length, Your Honor, ten years ago in an asbestos case before the First District in Johns-Manville Sales Corporation vs. Janssens at 463 (663) So.2d 242. Cert was denied in this case by the Florida Supreme Court.

They specifically argued, "The rationale of punishment and deterrence underlying the concept of punitive damages is absent. It argues that the persons who will bear the award are current management, directors, shareholders, employees, and customers who had nothing to do with the alleged misconduct and lack of warnings on asbestos products in the [40] 1930s, 1940s and 1950s." That is the precise argument that was rejected, Your Honor, by the First District.

In addition, Your Honor, as far as the concept of multiples — now, there has been no proof, no shred of proof in this case, not one bit of evidence in this case that Owens-Corning Fiberglas has ever paid one single dollar in punitive damages, not one dollar that they have ever actually paid out of their pocket.

They brought Mr. Pierce here, Your Honor, who had an opportunity to testify about whatever it was that they wanted him

to testify about, yet they never asked him whether or not the company had paid any punitive damages and, in fact, he testified, Your Honor, that he did not know what the money had been paid for, the money that they had, in fact, paid which I believe he testified was something in the neighborhood of eighty million dollars which sixty-one million we know went to defense costs, and he did not know how much of the other twenty million went to defense costs, and that range is what he [41] testified to, Your Honor.

The Second District Court of Appeals in 1988 in Bill Branch Chevrolet vs. Burkert at 521 So.2d 153 had the issue of this — the potential for multiple punitive damages. They state, "In considering the amount of punitive damages awarded to Burkert, this Court is aware that Bill Branch may be subject to other lawsuits stemming from the vacation promotion. Evidence of the adverse effects on Bill Branch which would be caused by the award of punitive damages in this and other pending cases was certainly admissible in avoidance or mitigation of punitive damages. Such evidence could then properly be considered by the jury in determining whether an award of punitive damages will bankrupt or destroy the defendant, but it is not a recognized basis for reversing what appears to be a large award of punitive damages to one plaintiff."

It goes on to say, "Although we believe the amount of punitive damages awarded here may be considered large, we find that reasonable men could differ as to whether the amount is so large that it should shock the [42] judicial conscience to the extent that a new trial or remittitur is required."

Here, Your Honor, the evidence, clear and convincing absolutely uncontradicted evidence in this case is that this

company went about a calculated plan which placed thousands of workers at risk of dying, that the plaintiff in this case happened to be one of those many people who is now suffering from a terminal illness because he worked with their product and that the company has a value of two billion dollars and that this jury did not even award one percent of the net worth of this company in punitive damages, and there is not one shred of evidence that this company has ever paid one dollar in punitive damages before.

For those reasons, Your Honor, that is — that is not just clear and convincing, Your Honor, but it is uncontradicted evidence in this case.

We would ask Your Honor that in that situation, the Florida Legislature never intended that companies could undertake a policy to place at risk tens of thousands of [43] people and then to be held, Your Honor, to no more than — as a bar to no more than three times compensatory when they are a multi-billion dollar, multi-national corporation.

THE COURT: I am going to deny the motion of the defendant in all respects except on punitive damages.

The ruling on punitive damages is as follows: I am going to order a remittitur by the plaintiff of six million, seven hundred fifty thousand dollars or in the alternative grant a new trial on punitive damages only. The plaintiff has the option of accepting the remittitur or going to — going to a new trial on the question of punitive damages.

I will give the plaintiff ten days to determine whether they want to accept — whether they want to accept the option or not.

In other words, the plaintiff has an option of going to trial on punitive damages alone. That is the only issue on the new trial or accepting a judgment for the eight million, two hundred fifty thousand dollars without a new trial, and the plaintiff has ten days to [44] determine whether they want to accept that option or not.

I want the plaintiff to exercise the option in writing, and upon exercising the option, then they can draw the judgment accordingly.

MR. VENABLE: Your Honor, there is — I understand Your Honor's ruling completely. I believe, as I understand it, it is acepting the number of three times —

THE COURT: Right.

MR. VENABLE: Three times the amount that Ms. Hill is suggesting.

THE COURT: Right, right.

MR. VENABLE: There is one other issue, Your Honor. I got the memorandum from Owens-Corning Fiberglas this morning and I do not — to tell you the truth, Your Honor, I had not looked at the case law, Your Honor, on the question of whether in considering the new statute, the three time multiplier, if you will, limited to the claim of Mr. Dudley in this instance.

I understand Your Honor's ruling and, in fact, it appears to me that Your Honor's [45] ruling would be three times whatever the appropriate number is, and it may very well be that Ms. Hill's number is appropriate. I just got this this morning and first

learned that it was their position that it could only be the amount of Mr. Dudley's compensatory damages, and I would just like the opportunity, Your Honor, just on that limited question, Judge, as to whether or not you may consider the total amount of punitive damages under the new statute which was not in effect.

So, I would just like — with the Court's permission if I could submit any cases that may show that that is not an appropriate response for the remittitur under this statute because it is not a matter that quite frankly I was aware that it was their position, and I have no cases on it, and it may very well be that Ms. Hill is absolutely correct, but because of the significance of what Your Honor is ruling, we would just like the opportunity if we could to address that one question by case law or memorandum if, in fact, that will — if there is anything to suggest to Your Honor because there may not be.

[46] (Pause)

MR. VENABLE: Your Honor, maybe we can do it this way. I think that this would be appropriate.

I could file a motion to reconsider the Court's order if I find any basis to challenge — I am not asking for any kind of rehearing on the Court's ruling that you are going to say that it is three times the maximum, but three times what is my only question.

I could file a motion for rehearing if there is any basis for that, I believe. I am not sure — I am trying to figure out technically if I can do that, Judge. I had not thought about it.

THE COURT: I do not — I am inclined to think that the

statute would not have any — would have no bearing on the basic law but that's the basic law.

MR. VENABLE: I believe it probably does but I want to make sure — the latest case cited to Your Honor was 1972. I know that currently, Judge, if Mr. Dudley had died, Mrs. Dudley could recover in a wrongful death [47] action punitive damages.

MS. HILL: That would be his estate and not Mrs. Dudley on her own action.

MR. VENABLE: I am not sure. I know in a wrongful death action that punitive damages can be awarded, and quite honestly, Your Honor, I have not looked at it, and the last case cited to us was 1972, and it is probably the same law, Your Honor, but because we may be dealing with four million dollars in punitive damages, I would just ask the Court's indulgence for a couple of days. I do not need long to do it.

THE COURT: Okay. The Court will give you five days to file any written memorandums concerning this matter.

MR. VENABLE: Thank you.

THE COURT: And if — and then the Court will notify you of whether or not the Court is going to change its ruling, and from my letter notifying you you will have the ten days to determine whether or not you are going to accept the option or not.

MR. VENABLE: Thank you, Your Honor.

THE COURT: All right. Any other . . .

* * *

APPENDIX B — EXHIBITS

DEFENDANT'S
EXHIBIT
OCF-270

OWENS/CORNING
FIBERGLAS **intra-company correspondence**

to C. E. Peck — T/25 from Jon L. Konzen, M.D.

date July 5, 1972

subject ASBESTOS
CAUTION
LABEL

cc: B. E. Boyd — T/27
R. S. Grant — T/25
W. L. Kreutz — T/26
J. W. Overman — T/26
L. W. Saxby — T/23
J. Vyverberg — New York
J. J. Young — T/12

The Standard for Exposure to Asbestos Dust promulgated in the Federal Register Vol. 37, No. 110, Wednesday, June 7, 1972 by the Department of Labor under the authority of OSHA of 1970 becomes effective July 7, 1972.

The Standard prescribes a specific caution label which must be affixed to all raw materials, mixtures, scrap, waste, debris and other products containing asbestos fibers or to their containers so that during any reasonably foreseeable use, handling, storage, disposal, processing or transportation, no airborne concentrations of asbestos in excess of the exposure limits prescribed.

Appendix B

At the present time the caution labels prescribed in OCF Purchase Acceptance Standards PAS.2.1.13 and PAS.2.1.43 all dated 6-14-72 do not contain the exact wording noted in the Standard. From a health warning standpoint the OCF and OSHA caution label wording are reasonably similar.

It would be wise to determine if the two labels are legally similar enough so an OCF label change is unnecessary. In the event it is determined a label change is required it may be advisable to request a variance in order to use the labeled cartons already in stock and to cover the period until asbestos is removed from Kaylo products and possibly Pyrcor Products.

The procedure to request a variance is outlined under Rules of Practice for Variances — Exemptions Under the Occupational Safety and Health Act (Code of Federal Regulations, Title 29, Chapter XVII, Part 1905, 36 F.R. 12290). Subpart B — Applications for Variances, Limitations, Variations, Tolerances, Exemptions and Other Relief, paragraph 1905.11 Variances and other relief under Section 6 (d). This information is also contained in the BNA Occupational Safety and Health Reporter, Page 41:4101.

If it is determined a variance is required it is suggested this be done through the Legal Department.

If you have any questions or comments please contact me.

JLK: mgm s/ Jon L. Konyen

Appendix B

DEFENDANT'S
EXHIBIT
OCF-260

OWENS/CORNING
FIBERGLAS **intra-company correspondence**

to J. H. Thomas - Toledo 27 from L. W. Saxby - Toledo 23

date January 31, 1972

subject cc: W. W. Boeschenstein — 27
C. E. Peck — 25

Confirming our conversation of last Thursday, here is a brief status report on high temperature insulation as you requested.

Immediate development of an asbestos-free high temperature insulation is a top priority program for the Construction Group and the Mechanical Products Division due to —

1) Accelerating trend by owners and engineers to issue insulation specifications excluding products containing asbestos.

2) New Proposed Federal Standards issued under the Occupational Safety and Health Act which will, in all probability, significantly increase the installed cost of all products containing asbestos.

In my judgment this development work must be completed in time to introduce a new asbestos-free product by January 1,

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1973. Currently we are pursuing three different programs to solve this problem as follows:

1) We are continuing, on a priority basis, our development of a completely new and improved high temperature product (HTIS). At this time we are conducting trials at Thermo-Kenetics in Greenville, S.C. on prototype equipment which utilizes an extrusion process. This is the preferred product based upon preliminary physical and thermal test data and gross margin projections.

2) Dick Shannon is currently evaluating all asbestos-free calcium silicate products now on the market in an attempt to find a combination of fibers that will produce a satisfactory asbestos-free Kaylo product utilizing our pan pour process manufacturing equipment in Berlin.

3) J-M has verbally offered to license our new asbestos-free process. They apparently want something from OCF in return, but we do not know what that something is at the moment. The J-M development apparently uses glass fibers for reinforcement but they do not believe that their process will work in our pan pour operation.

We introduced in November a "defensive" product called Glaslag to be used where mineral wool pipe insulation has been specified. This product consists of strips of IS Board turned on end and adhered to an aluminum jacket. It is recommended for operating temperatures up to 800^0 F.

LWS/js

cc: J. P. Kern
[illegible]

Appendix B

DEFENDANT'S
EXHIBIT
OCF-261

ASBESTOS-FREE KAYLO

2/16/72

ASBESTOS-FREE HIGH-TEMPERATURE INSULATIONS

Product Name	Company Name	Mfg. Process	Curing Process	Type of Reinforcement
USA				
Kaylo	OCF	Pan-Poured	SID	TBD
		Filter Press	SID	TBD
Thermo-Bestos	JM	Filter Press	Autoclave	Unknown (Glass?)
Calsilite	GAF	Filter Press	Autoclave	Wood Fibers
Super-Caltemp	PABCO	Extrusion	Autoclave	Jute, Cotton, Glass
Careytemp	Philip Carey	Comp. Molded	Oven Dried	Glass
Thermasil	BEH	Extrusion	Autoclave	Status Unknown
English				
Newtherm G	Newalls	Filter Press	Autoclave	Cotton or Wood and Glass
Nadinsulan	—	Filter Press	Autoclave	Glass (May Contain Asbestos)
Crosfield	Crosfield	Filter Press	Oven Dried	Glass (May Contain Asbestos)

Appendix B

DEFENDANT'S EXHIBIT
OCF-276

OWENS/CORNING FIBERGLAS **intra-company correspondence**

to See Distribution from G. S. Gilkey — 23

date July 31, 1972

subject Minutes of the Kaylo 10 — Asbestos Free Team Meeting July 25, 1972

cc:

The following is a chronological sequence of assignments resulting from the Team Meeting and Plant-Division meetings held on July 25-26.

Completion Date	Who	What
July 26	D. Anthony	*Complete.* Issuance of interim CAS and manufacturing specs for the non-asbestos Kaylo 10 product. These are to be in effect until the nomenclature is defined and the conversion date is effected at which time they will be updated.

Appendix B

July 26 — December 1	P. Scheuerle	Finished goods inventories of asbestos containing products to be balanced for easy phase out after December 1, 1972.
July 26 — December 1	D. Glosser	Exert maximum pressure to move the current slow moving inventories of Kaylo products out of the Berlin Plant.
July 31	L. Saxby	Letter to F. Wilson for development of a test method to determine during production that the finished material will withstand normal shipping abuse and be received in acceptable condition.
August 1	D. Glosser	*Notification* to P&P, MPD sales, CSC, Berlin of test marketing program — 8 specific customers for job follow (inspection report to be circulated to team members) and beginning 8/7, K10-AF, may be included in *any* shipment. Product ID, invoice insert, etc., to be spelled out.

Appendix B

DEFENDANT'S EXHIBIT
OCF-277

J.J. Doherty — 15

D. D. Mast — 26

July 31, 1972

KAYLO 10 (AF)
KAYLO 10 (ASBESTOS FREE)

J. B. Carrington — 23
R. C. Glosser — 23
P. T. Saverstrom — 23
J. W. Overman — 26

KAYLO 10 has been used as a trademark for many years. I discussed the use of the words "asbestos free" with Mr. Glosser and was assured that these words will not be used on KAYLO 10 labels prior to the time that all asbestos (including that in offware additions to the batch) is removed from the product.

If the letters "AF" are used on KAYLO 10 labels in an interim period, care must be exhibited to avoid misleading customers into believing that all asbestos has been removed when, in fact, it has not been removed from offware added to the batch.

s/ Daniel B. Mast
Daniel B. Mast
Law Department

DDM: mm

Appendix B

DEFENDANT'S
EXHIBIT
OCF-50.1

THE MANUFACTURE OF KAYLO PRODUCTS

by

W. C. Taylor

June 10, 1959

DISTRIBUTION RESTRICTED TO:

Mr. E. S. Adams — Toledo
Dr. L. P. Biefeld — Toledo
Mr. B. E. Boyd — Toledo
Mr. J. M. Briley — Toledo
Mr. P. B. Brown — Newark
Mr. F. R. Coumbe — Kansas City
Mr. R. S. Grant — Toledo
Mr. C. V. Handel — Toledo
Mr. L. R. Kessler — Toledo
Mr. R. J. Paoletti — Barrington
Mr. A. J. Pearson — Newark
Mr. O. W. Pfeifer — Berlin
Mr. W. K. Sidwell — Toledo (6)
Dr. A. C. Sifert — Newark
Mr. A. L. Simison — Toledo
Mr. H. V. Smith — Toledo
Mr. C. A. Smucker — Newark
Mr. G. C. Stefango — Toledo
Dr. W. C. Taylor — Toledo
Mr. E. J. Walker — Toledo
Mr. P. L. Welsh — Newark

Appendix B

The entire batch mixing facilities should be the object of study and comprehensive planning in view of the greatly increased demands for production. Present batch mixing facilities are essentially the same as those that first went into operation on March 12, 1954. More than twice as much slurry per day is being mixed now than it was then. The ultimate capacity of the system under the most efficient operation was considered at that time to be about 32 batches per day of the same type of slurry. Not only has this "limit" been exceeded, but the plant has been called upon on certain days to mix three types of slurries instead of only one.

The exact manner in which waste Kaylo products will be returned to the raw batch has not been determined as yet. Nor is it known how much of the material presently sent to the dump can be safely incorporated in the batch.

The quantity of dust that results from the trimming, routing, and planing operations far exceeds the weight of the reject ware. This Kaylo dust is collected in dust arrestors, and usually amounts to more than 5 tons per day, or nearly 15% of the weight of the solids that go into the Kaylo-10 thermal insulation batches daily.

Laboratory results thus far indicate that it is likely that this much can be returned to the raw batch without serious degradation of the quality of the product. In utilization on a plant scale, this dust will probably be transferred from the collectors to a tank where it will be mixed with water at a definite water/solids ratio. Plans call for two such tanks. During any one day, the dust and water will be mixed in one tank, and the dust-water slurry prepared the previous day drawn off from the other as needed in the batching operation.

Appendix B

DEFENDANT'S
EXHIBIT
OCF-261

ASBESTOS-FREE KAYLO

2/16/72

ASBESTOS-FREE PAN-POURED BATCH

COMPOSITION OF CURRENT PRODUCTION ASBESTOS CONTAINING PAN-POURED BATCH

MATERIAL	LBS./BATCH	% WT.
W-3 ASBESTOS	220	6.90
S-33 ASBESTOS	55	1.73
7D ASBESTOS	200	6.27
TOTAL ASB.	(475)	(14.90)
LIME	360	11.29
DE	480	15.06
SILICA	310	9.72
CEMENT	752	23.59
CLAY	100	3.14
LIMESTONE	160	5.02
CHROMITE	75	2.35
DUST	376	11.79
SODIUM SILICATE	100	3.14
TOTAL	3188	100.00

COMPOSITION OF BEST ASBESTOS-FREE PAN-POURED BATCH DEVELOPED TO-DATE

MATERIAL	LBS./BATCH	% WT.
GLASS	120	3.97
LIME	589	19.50
DE	456	15.09
SILICA	475	15.72
CEMENT	488	16.15
BENTONITE	238	7.88
DUST	569	18.83
SODIUM SILICATE	86	2.85
TOTAL	3021	99.99

Appendix B

DEFENDANT'S
EXHIBIT
OCF-274 WITH ATTACHMENTS

D. Glossar — 23 Tower

H. V. Smith — 11 Tower

July 26, 1972

KAYLO 10 AF

L. Saxby — 23 Tower
A. J. Pearson — 25 Tower
P. Scheuerle — Berlin

Attached is a copy of a rough draft of the two memorandums we discussed in the Kaylo Team meeting on July 25. They are offered to help you get these prepared for use with the Branch and the customers at the earliest possible date.

Only one point in the draft is considered critical. Until we are entirely on the new product and have cleaned our process system of all traces of asbestos we should avoid the statement of "asbestos free". I believe that we are honest in stating that no asbestos has been used as a reinforcement agent.

It is suggested that you review your final draft with the Legal Department prior to issue so as to make certain that our claims, either by direct statement or by inference, are legitimate.

s/ H. V. Smith
H. V. Smith

HVS: rib
Attachments

Appendix B

NOTICE

Included in the shipment covered by the attached invoice is a quantity of the new Kaylo 10 Asbestos-Free product, which has been produced without employing asbestos as a reinforcement material. Its properties are of the same order as the standard K-10. If you have any comments relative to the material, please advise the local OCF sales representative immediately.

You are aware of the need for a calcium silicate product which does not use asbestos for reinforcement, yet which retains the same beneficial properties which have been provided by Kaylo-10 pipe and block insulation. The Kaylo 10AF material, we believe, fits this need.

In order to initiate a change over to the new product, it is necessary, for a period of time, that we inter-mix Kaylo-10 and Kaylo 10AF on many shipments. We will keep you advised of mixed shipments by means of this memo being attached to invoices where intermixing has occurred. Your cooperation and comments will be greatly appreciated.

Appendix B

PLAINTIFF'S
EXHIBIT
4315.0

Produced *in camera* under seal by order of Judges Paul Riley and Gordon [illegible]. October 16, 1969, in *[illegible]*, et al. 67-L1236

Steve Mayer — T/26

Jon L. Konzen, M.D.

August 29, 1972

ASBESTOS-FREE KAYLO

Owens-Corning Fiberglas Corporation has for many years marketed under the trademark KAYLO a calcium silicate asbestos containing high temperature product. During the manufacture and installation of KAYLO products, airborne concentrations of asbestos containing dust are generated. Because asbestos is known to cause a fibrosis of the lung called asbestosis, carcinoma of the lung tissue and malignant mesothelioma of the covering or pleura of the lung extensive, stringent and costly engineering controls and medical monitoring of exposed employees has been necessary.

In areas where engineering controls were not feasible, either in the plant or at the site of application, it has been necessary to wear protective respiratory equipment. Respirators are a poor second choice for protection of the worker.

Largely for reasons of health of exposed workers, asbestos-free

Appendix B

KAYLO has been developed. The asbestos has been replaced with fibrous glass. To date, observation of workers — some of whom have been exposed for over thirty years — has not demonstrated chronic, adverse pulmonary effects from exposure to fibrous glass. From a medical standpoint, fibrous glass is an excellent substitute for asbestos in the KAYLO product.

If you have any questions or comments concerning the above statement would you please contact me.

JLK:mgm

(3)

Supreme Court, U.S.
F I L E D
APR 8 1996
CLERK

No. 95-1449

IN THE

Supreme Court of the United States

October Term, 1995

OWENS-CORNING FIBERGLASS CORPORATION,

Petitioner

v.

CLARENCE DUDLEY AND GEORGIANNA DUDLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF BY AMICUS CURIAE, THE STATE OF FLORIDA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General of Florida

LOUIS F. HUBENER
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(Counsel of Record)

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12 pgs

QUESTION PRESENTED

The State of Florida, as amicus curiae, believes the second of the two questions presented can be more accurately stated as follows:

> **WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO A STATE'S STATUTORILY-DERIVED SHARE OF PUNITIVE DAMAGES AWARDED IN LITIGATION BETWEEN PRIVATE PARTIES, WHEN THE ACTION IS NOT BROUGHT IN THE STATE'S BEHALF.**

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No. 95-1499

IN THE

Supreme Court of the United States

October Term, 1995

OWENS-CORNING FIBERGLASS CORPORATION,

Petitioner

v.

CLARENCE DUDLEY AND GEORGIANNA DUDLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF BY AMICUS CURIAE, THE STATE OF FLORIDA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The litigation below proceeded between private parties only. It was not brought in the State's name. The State of Florida's interest was inchoate until a jury awarded $8.25 million in punitive damages against Petitioner, Owens-Corning.

By operation of law, Florida is entitled to 35% of punitive damages awarded. § 763.78, Florida Statutes (1995). Petitioner separately challenges this share as an excessive fine. Florida's interest is in upholding the application of §768.73, thereby preserving its share of the award.

PARTIES INVOLVED

Neither the State of Florida nor any of its agencies was a party to the litigation below. No separate action has been maintained against Petitioner. Otherwise, Petitioner's list of parties is accepted.

Since Petitioner attacks the constitutionality of §768.73, Florida Statutes, the Attorney General of Florida was entitled to notice and service under this Supreme Court Rule 29.4(c). Counsel is not aware that such service was made.

Under Rule 37.5, the parties' consent to this amicus brief is not required.

SUMMARY OF ARGUMENT

The decision below does not warrant certiorari review under Rule 10.1(b) or (c). With regard to the second question presented (Florida's share of the punitive damages), the Second District Court of Appeal did not decide a federal question in a way conflicting with a decision by another state court of last resort or by this Court. The petition for certiorari does not allege such.

The question reserved by this Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 n. 21 (1989), is not presented. Florida was not injured in fact; it took no action to obtain the award of punitive damages. The plaintiffs below did not bring a suit in the name of the State to redress harm to the State, and did not share in an award of punitive damages made to the State.

Section 768.73, Florida Statutes, does not establish a cause of action to be brought by a private person on behalf of the State. Rather, it requires final judgments to allocate 35% of punitive damages to the State.

To the extent it attacks Florida's derivative share of punitive damages, the petition for certiorari must be denied. If the overall amount of punitive damages is proper under the U.S. Constitution, Florida's smaller share of that amount must also be constitutional, and cannot logically be "excessive."

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW, AND SHOULD BE DENIED.

The petition for writ of certiorari should be denied. With regard to Florida's share of punitive damages, the Second District Court of Appeal did not decide a federal question in a way conflicting with a decision by another state court of last resort or by this Court. The petition for certiorari does not allege such. To the contrary, Petitioner urges this Court to grant certiorari to answer the question of whether a state's share of punitive damages obtained by private parties can be construed as an "excessive" fine.

The petition should be denied for a second reason. Contrary to Petitioner's contention, the facts of this case do not present the question reserved in *Browning - Ferris, supra*. There, the Court discussed an earlier decision and said:

> We left open the question whether a *qui tam* action, in which a private party brings suit *in the name of the United States* and shares in any award of damages, would implicate the Double Jeopardy Clause. We leave the same question open for purposes of the Eighth Amendment's Excessive Fines Clause. [e.s.]

492 U.S. at 275, n. 21, *citing U.S. v. Halper,* 490 U.S. 435 (1989) [internal citations omitted].[1]

The critical phrase is "in the name of the United States."[2] Obviously, the federal government should not be able to escape the prohibition against excessive fines simply by allowing a private party to sue on its behalf. The same logic would apply to a state-level *qui tam* action and its modern counterpart, the "private attorney general" action. In either instance, a private party would be suing in the State's name, under a cause of action not available to individuals acting in their private capacity only.

In contrast, the litigation below always involved private parties only. The suit was not brought in Florida's name. At no time did the State enter the lawsuit.

Respondents' injuries arose from exposure to asbestos-containing products, including insulation manufactured by Petitioner. Florida was never injured in fact. Thus, the litigation below lacked an essential characteristic of a *qui tam* action—injury to the State or the government. See *U.S. v. Tribal Development Corporation,* 49 F.3d 1208 (7th Cir. 1995):

> So when a legislative body enacts provisions enabling *qui tam* actions, that act carries with it an understanding that in such suits it is the government, and not the individual relator, who has suffered the injury....

---

1 In footnote 22 (492 U.S. at 275), the Court also declined to decide whether the Excessive Fines Clause "applied to the several States through the 14th amendment, [and]...whether the Eighth Amendment protects corporations as well as individuals." Based on Florida's argument herein, it is still not necessary to answer these questions.

2 A *qui tam* action is one in which the "plaintiff states he sues as well for the state as for himself." *Black's Law Dictionary* (revised 4th ed., 1968) at 1414.

Id. at 1212. See also, *U.S. v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992) ("A *qui tam* relator...has no personal stake in the damages sought—all of which, by definition, were suffered by the government.").

In addition to Florida's lack of injury, there is the language of §768.73 itself. Nothing in that statute even intimates the creation of a cause of action, much less an action brought by private parties to enforce the law on behalf of the State. The award of punitive damages below cannot possibly be construed as the result of State action, or action on behalf of the State. Therefore, no *qui tam* action was prosecuted; and the question reserved in *Browning-Ferris* is not presented to this Court.

Florida's interest did not arise until punitive damages were awarded against Petitioner.[3] Under §768.73(2)(b), Florida Statutes (Pet., p. 120a–122a),[4] Florida is entitled to 35% of punitive damages awarded. However, the jury may not be "instructed or informed" of the State's share. §768.73(8). The State's award is not made until the final judgment, in which the "court shall order the percentages of the awards, payable as provided in subsection (2)." §768.73(3). The obvious inference is that the jury's award of punitive damages is based entirely on the jury's perception of the defendant's conduct, and not on the knowledge that the State will receive a share of the award. The State simply has no "presence" that could influence the award.

---

3 Subsections 768.73(2)–(7) were repealed in 1992 by §3 of ch. 92-85, Laws of Fla., effective July 1, 1995. However, the Florida Attorney General recently opined these subsections still operate as to punitive damages awarded before that date. *See* Op. Atty. Gen. 96-15 (Feb. 28, 1996) (the Dept. of Banking and Finance has a duty to collect the state's share of punitive damages awarded by a verdict rendered before July 1, 1995).

4 The petition for certiorari will be cited as (Pet., p.__).

Nothing in §768.73 gives Florida standing to enter private litigation for purposes of obtaining punitive damages. The State cannot contest a private party's decision not to seek punitive damages; or a private party's decision to settle, before a verdict is reached, without obtaining punitive damages.

Even when a verdict awards punitive damages and the parties settle afterward, the State cannot contest the amount of the settlement.[5] All the State may do is insist on its "proportionate share" of the settlement amount. §768.73(4).

Consequently, there is no State action involved.[6] Florida has merely conditioned a private party's right to receive punitive damages upon payment of 35% to the State. Here, the plaintiffs below did not share in an award of punitive damages obtained in the State's name. In fact, the reverse is true. The State shared an award obtained by plaintiffs in their own names.

If both the award and amount of punitive damages are proper here, Florida's share could not have been an excessive fine. First, it was not a fine at all. It was but a share of an award, all of which would have gone to Respondents. Next, such share was 35% of the overall amount awarded by the jury. If that amount was constitutionally sound, then Flor-

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5 Once an award of punitive damages has become final, the State may intervene to protect its interest in its share. See *Gordon v. State*, 585 So.2d 1033, 1038 (Fla. 3d DCA 1991), *affirmed with opinion*, 608 So.2d 800 (Fla. 1992), *cert. den.*, 113 S.Ct. 1647 (1993) (trial court did not abuse its discretion by allowing state to intervene, when defendant moved to correct final judgment which mistakenly allocated all of punitive damage award to plaintiff).

6 See *Gordan, supra* note 5, 608 So.2d at 803 (observing, that under an earlier version of the statute at issue here, "the State did nothing to earn its sixty-percent share") (Shaw, J., dissenting).

ida's fractional share could not have violated the Eighth Amendment's prohibition against excessive fines.

A defendant's obligation to pay punitive damages arises when the verdict is rendered. At such time, there has been no State action. The State's entitlement to 35% of punitive damages vests later, upon the rendering of a final judgment. That the State later receives a portion of the punitive damage award has no bearing on the amount of the award initially.

In effect, Petitioner's second argument challenges how the total punitive damages award is allocated *after* the obligation to pay has been established. That argument overlooks the remedy. If Petitioner's argument were correct, the final judgment would be changed to allocate the entire punitive damage award to Respondents. Otherwise, Petitioner would escape its obligation to pay full punitive damages simply because one of two recipients was later held ineligible.

Consequently, this case does not warrant certiorari review as to Petitioner's second point. Should a private party sue and be awarded punitive damages in the name of a state, then the question of an excessive fine would arise. Until that time, there is no need for this Court to answer a hypothetical question.

CONCLUSION

The petition for certiorari must be denied. Alternatively, the petition should be granted only as to first question presented by Petitioner.

Respectfully submitted,

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